87-1479

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARLIN COMMUNICATIONS, INC., AND
SAPPHIRE COMMUNICATIONS, INC.,
Petitioners,

vs.

THE MOUNTAIN STATES TELEPHONE
& TELEGRAPH COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

Both the district court and the court of appeals held that the Mountain States Telephone and Telegraph Company ("Mountain Bell") unconstitutionally terminated petitioners' message services under "color of state law," but the court of appeals vacated the district court's injunction restoring service because, two days after termination, Mountain Bell adopted a new "corporate policy" banning messages with any "sexual content." The narrow questions presented are:

> 1. Whether the regulated utility's banning of petitioners' information services based on the content of future messages, a "policy" encouraged by the state utility commission and adopted after threats of prosecution by state law enforcement officials and pressure by legislators and school officials, constitutes "state action" for purposes of First Amendment protections and civil rights remedies.
>
> 2. Whether the taint of the state-compelled termination was vitiated — as a matter of law and without regard to Mountain Bell's motivations — by the utility's newly announced "corporate policy," so as to render inappropriate injunctive relief restoring service, the situation that prevailed before the unconstitutional termination.

In addition, this case poses a broader and more topical "state action" question of signal importance to the emerging electronic publishing industry:

> 3. Whether the owner of a private and effectively monopolistic channel of communication dedicated to public expression, which is heavily regulated by the state and particularly

subject to governmental and public pressure, may ban speakers from the forum based upon the content of messages to be communicated.

List of Parties (and Corporations Related to Corporate Parties)

The petitioners, both of which are corporations, have no corporate parents or subsidiaries but might be considered to be "affiliated" with the following entities: Joy Communications of California, Inc.; Lynx Communications of California, Inc.; Sable Communications of California, Inc.; Sapphire Communications of Colorado, Inc.; Sapphire Communications of Florida, Inc.; Sapphire Communications of Georgia, Inc.; Sapphire Communications of Iowa, Inc.; Sapphire Communications of Kentucky, Inc.; Sapphire Communications of Louisiana, Inc.; Joy Communications of Maryland, Inc.; Sapphire Communications of Maryland, Inc.; Joy Communications of Michigan, Inc.; Sapphire Communications of Michigan, Inc.; Sapphire Communications of Minnesota, Inc.; Sapphire Communications of Nebraska, Inc.; Sapphire Communications of Nevada, Inc.; Sapphire Communications of Oregon, Inc.; Joy Communications of Pennsylvania, Inc.; Sapphire Communications of Pennsylvania, Inc.; Sapphire Communications of Texas, Inc.; Sapphire Communications of Virginia, Inc.; Sapphire Communications of Washington, Inc.; Sapphire Communications of Washington, D.C., Inc.; Topaz Communications of Arizona, Inc.; Topaz Communications of California, Inc.; Topaz Communications of Florida, Inc.; Topaz Communications of Georgia, Inc.; Topaz Communications of Kentucky, Inc.; Topaz Communications of Louisiana, Inc.; Topaz Communications of Maryland, Inc.; Topaz Communications of Nevada, Inc.; Topaz Communications of Pennsylvania, Inc.; Topaz Communications of Washington, D.C., Inc.; Topaz of Colorado, Inc.; Topaz of Illinois, Inc.; Topaz of Oregon, Inc.; Topaz of Virginia, Inc.; Topaz of Washington, Inc.; CVC On Line, Inc.; and Phone Fulfillment, Inc.

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Table of Conventions

The following conventions are used in this petition:

"App." (appendix to petition for writ of certiorari)

"CR" (item from the district court clerk's record)

"Ex." (exhibit introduced during proceedings in the district court (collected at CR 51A))

"ER" (item from the Excerpts of Record submitted to the court of appeals)

"SER" (item from the Supplemental Excerpts of Record submitted to the court of appeals)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Carlin Communications, Inc., and Sapphire Communications, Inc. (collectively, "Carlin"), ask that a writ of certiorari issue to review the amended judgment of the United States Court of Appeals for the Ninth Circuit, entered December 7, 1987.

Opinions Below

The opinion of the court of appeals is reported at 827 F.2d 1291. [A copy is reproduced as App. A] The final judgment entered by the United States District Court for the District of Arizona was not reported. [A copy is reproduced as App. B]

Jurisdiction

The judgment of the court of appeals was entered on September 14, 1987. That court denied a timely petition for rehearing with suggestion for rehearing *en banc* and amended the original judgment on December 7, 1987. This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a), 28 U.S.C. § 2201 and the doctrine of pendent jurisdiction.

Constitutional Provisions and Statutes Involved

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .

Title 42, section 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[1]

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[1] Additional constitutional, statutory and regulatory provisions involved in this petition include Ariz. Const. art. 15, §§ 2-3 (1984), Ariz. Rev. Stat. Ann. §§ 13-3501(3), 13-3506(A) (1978), and excerpts from the

Statement of the Case

A. *State Regulation of the 976 Message Network*

Since December 1984, Mountain Bell has operated a mass-announcement service (the "976 Message Network" [SER 180, p. 101]), which serves as a vehicle for a wide variety of information providers [Ex. B (stock market quotes, news updates, jokes, movie reviews, etc.)]. As Mountain Bell described its service, the "976 Network Service allows private firms to provide information to callers for a fee. Programs may consist of prerecorded announcements or interactive computer data bases." [App. D, p. A-27 (Ex. H) (Excerpts from Mountain Bell's "Sponsor Overview")] The service allows message sponsors to participate in "electronic publishing," also known as information publishing. *See United States v. AT&T*, 552 F. Supp. 131, 181-83 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The regional Bell operating companies, such as Mountain Bell, offer "information access" services to electronic publishers such as Carlin. In the rubric of the industry, Carlin is an "information provider." See 552 F. Supp. at 228-30. Citizens access these information services over their ordinary telephone lines (by dialing "1-976-XXXX") and are billed monthly for the service as part of their regular telephone bills. [App. D, p. A-27]

Mountain Bell's 976 Message Network uses special equipment "designed to handle large volumes of calls" and the service "cannot be obtained [by information providers] with ordinary business lines." [App. D, p. A-27] As the regional telephone monopoly, Mountain Bell is the only local company that provides a 976 Message Network, and citizens who wish to access local information services (without incurring long distance charges) are compelled to use

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Exchange & Network Services Tariff, Part 2.2.9(A). [Copies are reproduced as App. C]

Mountain Bell's 976 Message Network. [CR 81, Ex. CC (para. 8)]

The Arizona Corporation Commission (the "Commission") extensively regulates — and approves all tariffs for — services of "public service corporations," which include "common carriers" and companies engaged in "transmitting messages." Ariz. Const. art. 15, §§ 2, 3, 10 (1984). The Commission has "full power to, and shall" fix rates and "make reasonable rules . . . by which such corporations shall be governed in transacting . . . business." Ariz. Const. art. 15, § 3 (1984). The Commission "may prescribe the form of contracts and the systems of keeping accounts to be used by such corporations." *Id.*

The State of Arizona has passed numerous statutes and rules implementing this regulatory power. *See generally* Ariz. Rev. Stat. Ann. §§ 40-201 to -339, 40-361 to -433 (1985) (statutes applicable to public service corporations); Ex. A (Ariz. Comp. Admin. R. & Regs. R14-2-501 to -510 (1982)) (Commission regulations applicable to "Telephone Utilities"). In particular, the state requires that telephone service be provided on a nondiscriminatory basis. Ariz. Rev. Stat. Ann. § 40-334 (1985). The Commission also specifically regulates the conditions requiring Mountain Bell to provide service [Ex. A (Ariz. Comp. Admin. R. & Regs. R14-2-503(C)(1)(1982))] and the grounds upon which Mountain Bell may terminate service [Ex. A (Ariz. Comp. Admin. R. & Regs. R14-2-509(B)(1), (C)(1)(1982))]. In short, the state approves and supervises the character of Mountain Bell's services and facilities.

In approving the proposed tariff for the 976 Message Network, the Commission found that Mountain Bell was providing the service as "a public service corporation" [App. E, p. A-44] and "concluded . . . that approval of the tariff was in the public interest" [App. E, p. A-43]. [See Ex. D]

Soon after it first approved Mountain Bell's 976 Message Network service, the Commission began receiving

"numerous complaints regarding the service," among them that "[t]he service should be discontinued or modified because it provides minors with unrestricted access to sexually explicit and obscene conversations intended for adults." [App. E, p. A-43] As a result, Mountain Bell and the Commission were pressured into amending the tariff to allow phone customers an option to block access to the 976 Message Network. [App. F] Despite the amendment, the volume and nature of complaints about message content received by the Commission later gave it "reason to believe that continued provision of '976' . . . service in its current form is no longer in the public interest and that the service should either be discontinued or that the terms and conditions upon which it is offered should be altered or amended." [App. E, p. A-44][2]

B. *Mountain Bell's Termination of Carlin's Service Following Threats of Prosecution*

Beginning in March 1985, Carlin began offering adult-oriented recorded messages over the 976 Message Network. [SER 180, pp. 101-02] In May of 1985, a Deputy Maricopa County Attorney wrote two letters to Mountain Bell [App. G (Exs. M, N)] stating that Carlin's messages and those of certain others violated Ariz. Rev. Stat. Ann. § 13-3506 (1978) [App. C, p. A-24]. That statute makes it "unlawful for any person knowingly to give, lend, show, advertise for sale or distribute to minors any item which is harmful to minors" (as defined in Ariz. Rev. Stat. Ann. § 13-3501(3)(1978) [App. C, p. A-24]). The county prosecutor's second letter warned Mountain Bell that Carlin's "services should be terminated" and threatened: "Should Mountain Bell continue to air these messages, it is the intention

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[2] The Court may take judicial notice of Commission records. *See White v. Califano*, 437 F. Supp. 543, 560 (D.S.D.) (judicial notice of public records of a state agency), *aff'd*, 581 F.2d 587 (8th Cir. 1977).

of this office to prosecute not only the subscribers who provide the messages, but Mountain Bell." [App. G, p. A-49 (Ex. N)]

Consistent with its common carrier status, Mountain Bell had established a policy for its 976 Message Network that "[p]rogram sponsors . . . have sole responsibility for program content . . . ." [App. D, p. A-27] Nevertheless, Mountain Bell notified Carlin of the county prosecutor's assertion that the content of Carlin's messages violated the Arizona statute. [App. H (Exs. O, P)] Mountain Bell's letters quoted Part 2.2.9(A)(7) of its Exchange and Network Services Tariff [App. C, p. A-25–A-26], which provides in pertinent part: Mountain Bell "may terminate service, with notice . . . if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law . . . ." Finally, the letters advised that, pursuant to this tariff provision, Carlin's service "will be suspended and terminated on or after 5:00 p.m. Mountain Standard Time, May 29, 1985." [App. H, p. A-53 (Exs. O, P)] The termination took place as announced.

Mountain Bell also filed a complaint against Carlin and others in federal district court, seeking a declaration of its right to terminate Carlin's service under the tariff. [App. I (Ex. Q)] Mountain Bell averred that the termination was "a result of [certain] letters from the County Attorney's Office, and under threat of criminal prosecution [under the Arizona "harmful to minors" statute] for not exercising precensorship on the content of messages not adjudicated obscene." [App. I, p. A-59 (para. 17) (Ex. Q)]

C. *Mountain Bell's Purported "New Policy"*

Two days after the May 29 termination of Carlin's service, bowing to pressure from state "legislators and school officials," Mountain Bell adopted what it termed a "new policy." [App. J, p. A-64 (para. 3) (CR 81, Ex. AA) (Mountain Bell affidavit)] Mountain Bell's "policy" banned from its 976 Message Network all information providers

who "provide adult entertainment messages with sexually oriented content." [Ex. S] The "policy" applied to anyone who "proposed to use a line for adult entertainment with sexual content or containing foul or profane language irregardless of whether the message was sufficiently explicit to violate Arizona's . . . obscenity statutes." [App. J, p. A-65 (para. 5) (CR 81, Ex. AA)] Mountain Bell then dismissed its federal court complaint seeking declaratory relief. [Ex. S]

D. *Proceedings in the District Court*

Carlin immediately filed its own action challenging the termination and seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 and Arizona law. To focus the challenge on the constitutionality of Arizona's "harmful to minors" statute, Carlin stipulated (for the purpose of summary adjudication only) that its previously transmitted messages met the statutory definition of "harmful to minors." [ER 221, pp. 44-45, 52]

The district court ruled as a matter of law in Carlin's favor that: (i) Mountain Bell's termination of Carlin's service on the basis of message content and in response to threats of prosecution under a state statute by a state official constituted state action; (ii) the tariff, which permitted Mountain Bell's termination of Carlin's service at the request of the state official based upon the content of past messages, constituted an unlawful prior restraint of speech; (iii) the state statute relied on by Mountain Bell and the state official was unconstitutional as applied (which the court later replaced with a ruling that the statute was inapplicable by its terms to Carlin's service); and (iv) Mountain Bell's announced "policy" was unlawfully discriminatory under state law. [SER 179] Based on those rulings, the court entered a preliminary injunction ordering Mountain Bell to preserve the status quo by reconnecting Carlin's service. [SER 180] Carlin waived money damages to obtain a prompt final judgment [ER 226, p. 60], and the district court entered judgment in Carlin's favor, issuing

declaratory judgments and a permanent injunction requiring reconnection [App. B, p. A-17–A-18 (paras. 2, 3)]. The district court reasoned "that Mountain Bell's termination of service was illegal . . . and that an injunction is necessary to restore the status quo as it existed prior to Mountain Bell's illegal termination of plaintiffs' message services." [App. B, p. A-18 (para. 3)] The court retained jurisdiction to "modify[] the terms of the injunction if necessary or appropriate." [App. B, p. A-18 (para. 5)]

E. *Proceedings in the Court of Appeals*

On appeal, the Ninth Circuit panel unanimously agreed that Mountain Bell's initial termination amounted to an unconstitutional deprivation of Carlin's rights under color of state law. Specifically, the court held that:

> (i) "The county attorney's threat of prosecution provided the requisite 'nexus' between the state and the challenged action. *See Jackson* [*v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)]." [App. A, p. A-10]
>
> (ii) "[T]he termination of Carlin's service was an unlawful prior restraint." [App. A, p. A-11]
>
> (iii) "Arizona's criminal statute protecting minors, the state law under which the county attorney's office threatened to prosecute Mountain Bell, cannot be constitutionally applied against Carlin's message service. The First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to 'hearing only what is fit for child.' *Butler v. Michigan*, 352 U.S. 380, 383 (1957)." [App. A, p. A-12]

Nevertheless, a divided panel reversed and vacated the injunction. Notwithstanding that Mountain Bell's initial termination decision was infected with state action sufficient to render the act unconstitutional and a violation of Carlin's civil rights, a majority of the court held, based on a "public function" analysis, that Mountain Bell's "new policy" — adopted two days after the initial termination — was not imbued with "state action" as a matter of law. The majority reasoned that, because the government is prohibited from censoring without a prior judicial determination by the First and Fourteenth Amendments, the exercise of that power was not a "traditional" governmental function. [App. A, p. A-12]

In so ruling, the majority held "immaterial" the parties' factual dispute as to whether Mountain Bell's "new policy" reflected "its independent business judgment" or whether it "was continuing to yield to state threats of prosecution." [App. A, p. A-12] The majority vacated the injunction, effectively granting summary judgment against Carlin. That result depended exclusively on the majority's surmise — which is contrary to the undisputed effect of the county attorney's and Commission's actions here — that the court's own decision holding the state statute unconstitutional as applied insulated Mountain Bell from any coercion, rendering it free as a private business to deprive Carlin of its channel of communication. [App. A, p. A-13]

That rationale provoked a dissent, which attacked the majority's decision on three grounds:

> (i) "First, there is no evidence that the state has retreated from the threats that initially caused Mountain Bell to suspend Carlin's services unconstitutionally. So long as official compulsion or the threat of it remains, the subjective motives of Mountain Bell do not save its actions from the Constitution's reach. *Peterson v. City of Greenville*, 373 U.S. 244 (1963)." [App. A, p. A-14]

(ii) "Second, it is no answer to say that the state's compulsion has ceased to exist because our decision today immunizes Mountain Bell from the unconstitutional state pressure. By that reasoning, no plaintiff could ever obtain injunctive relief against a private party on a state action theory." [App. A, p. A-14]

(iii) "Third, the connection of Mountain Bell with the state is stronger than it would otherwise be because of Mountain Bell's status as a regulated utility. It is true that *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), held that the actions of a private, regulated utility do not automatically become those of the state. But the test in such cases is whether the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1981)." [App. A, p. A-15]

Reasons for Granting the Petition

I. THIS CASE RAISES IMPORTANT ISSUES REGARDING THE REMEDIES AVAILABLE FOR CONSTITUTIONAL VIOLATIONS.

A. *The Court of Appeals' Declaration of Unconstitutionality Did Not Foreclose the Need for a Remedy.*

In vacating the injunction, the court of appeals reasoned:

> [I]nasmuch as the state under the facts before us may not coerce or otherwise induce Mountain Bell to deprive Carlin of its communication channel, Mountain Bell is now free to once again extend its 976 service to Carlin. *Our decision substantially immunizes Mountain Bell from state pressure to do otherwise.*

[App. A, p. A-13 (emphasis supplied)] As the dissent in the court of appeals explained, under this reasoning no citizen ever could obtain injunctive relief where a private party subjects him to deprivation of constitutional rights under state encouragement or compulsion because the court's very ruling would foreclose the need for a remedy. Title 42, section 1983 expressly provides for injunctive relief "for redress" of any violation. This case thus presents a substantial question of statutory interpretation concerning the availability of injunctive remedies for demonstrable constitutional violations actionable under section 1983.

The remedy that Carlin seeks (and to which it is entitled under section 1983) is the injunction originally entered by the district court requiring reconnection of service "to restore the status quo as it existed prior to Mountain Bell's illegal termination of plaintiffs' message services." [App. B, p. A-18 (para. 3)] The district court ordered reconnection because the only ground upon which Mountain Bell

terminated Carlin's service — the threat by the County Attorney — resulted in the unconstitutional deprivation of Carlin's rights. The Commission's regulations and tariffs did not permit Mountain Bell to disconnect Carlin's service on the basis of sexual content.[3] Contrary to the majority's reasoning, therefore, Mountain Bell was *not* free to do or to refrain from doing business with Carlin as it chose. [App. A, p. A-13]

The district court's order retained jurisdiction over the action to modify the terms of the injunction where necessary or appropriate. [App. B, p. A-18 (para. 5)] Thus, if the Commission modified its regulations or approved new tariff provisions authorizing termination of service based upon the sexual content of messages, Mountain Bell had the right to pursue modification of the injunction. Any additional involvement by the state, of course, would have raised additional "state action" considerations.

More fundamentally, the majority in the court of appeals ignored Carlin's entitlement to "redress" in section 1983, notwithstanding that civil rights statutes should be interpreted to give effect to their equitable remedial provisions. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Because the fashioning of appropriate injunctive relief traditionally is left to the district court, the remedy provided may be undone on appeal only for abuse of discretion. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

The decision of the court of appeals, which ruled as a matter of law that Carlin was not entitled to any equitable remedy, is inconsistent with the application of section 1983 by other circuits. *See, e.g., NAACP v. City of Evergreen*, 693

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[3] Under Arizona law, Mountain Bell may terminate (or refuse to connect) information providers only under state-approved tariffs or regulations. *In re Trico Elec. Coop., Inc.*, 92 Ariz. 373, 385, 377 P.2d 309, 318 (1962).

F.2d 1367, 1370-71 (11th Cir. 1982) (injunctive relief mandatory absent clear and convincing proof that there is no reasonable probability of further misconduct); *Reuber v. United States*, 750 F.2d 1039, 1061 (D.C. Cir. 1984) (federal injunctive relief traditionally presumed available where there is state action and a constitutional violation); *see also Miller v. Fairchild Indus.*, 797 F.2d 727, 733 (9th Cir. 1986) ("A plaintiff with a cause of action under section 1981 is entitled to equitable and legal relief").

The court of appeals' decision in this case rewrites civil rights law and does away with any reason for injured citizens to seek equitable redress. This important constitutional and statutory issue should be resolved by this Court.

B. *Mountain Bell's New "Policy" — Adopted Two Days After the Coerced Termination — Did Not Expunge the Taint of State Action.*

The court of appeals held that Mountain Bell's motives in adopting its new "policy" two days after the initial coerced termination were "immaterial" to the determination of state action. [App. A, p. A-12] That holding, announced without benefit of any authority, effectively granted summary judgment against Carlin's factual contention that Mountain Bell's purported "policy" was a litigation tactic that did not vitiate the substantial state encouragement, support and approval of the "policy."

The determination of whether Mountain Bell's "policy" was orchestrated, overtly or covertly, by state actors in furtherance of state policies to protect minors, and thus "under color of state law," is a peculiarly factual determination. As the Court observed in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961): "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." And in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), the Court emphasized that

"[t]he true nature of the State's involvement may not be immediately obvious, and a detailed inquiry may be required in order to determine whether the test is met."

The facts in this case suggest that Mountain Bell's new "policy" can be attributed to the state. First, Mountain Bell adopted its "new policy" only after it terminated Carlin's service under threat of prosecution — a threat that the County Attorney never withdrew. Mountain Bell submitted no evidence in opposition to Carlin's assertion that the threat of criminal prosecution was a factor in Mountain Bell's new "policy" — indeed, Mountain Bell's only affidavit specifically refers to the threat. [App. J, p. A-64 (para. 3) (CR 81, Ex. AA)][5]

Second, the explanation contained in the Mountain Bell affidavit, the only evidence it offered on the subject, concluded that its "policy," adopted after "expressions of concern by legislators [and] school officials," was motivated principally by public concerns and was designed to placate objections to the content of Carlin's messages. [App. J, p. A-65 (para. 5) (CR 81, Ex. AA)] Mountain Bell's extreme sensitivity to public cries for censorship is no doubt predicated on the fact that its rates of return and service offerings, including its lucrative 976 Message Network, are subject to detailed scrutiny by the Commission. The Commission's "carrot," enticing Mountain Bell to act as a censor of messages in support of a state policy to protect minors, is the substantial revenues the utility earns from operation of its 976 Message Network; the "stick" is the Commission's

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[5] Where a party has sole possession of the facts relating to a given issue but fails to produce evidence, a court may properly grant summary judgment against that party. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). Mountain Bell had sole possession of its reasons for terminating Carlin's service, yet failed to produce any evidence rebutting the contention that Mountain Bell's "new policy" was motivated by governmental encouragement, support and approval.

threat to withdraw the franchise as not "in the public interest." For example, following the unconstitutional termination of Carlin's services and adoption of its new "policy," the Commission extensively examined the extent of sexual messages transmitted over Mountain Bell's 976 Message Network. [App. E] Based on numerous complaints about services that provide "minors with unrestricted access to sexually explicit" communications, the Commission has even considered ordering Mountain Bell to halt its 976 Message Network altogether. [App. E, p. A-43 (para. 5a)][6]

Third, because the Commission explicitly regulates the terms and conditions by which Mountain Bell must offer or terminate service, its inaction in the face of Mountain Bell's censorship suggests state approval and encouragement. It should not matter whether the Commission officially "approved" Mountain Bell's censorship practices or simply failed to enforce its rules limiting the grounds for termination. State action will be inferred in either event because "[b]y its inaction, the [Commission], and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power . . . and prestige behind the admitted discrimination." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

As the Court noted in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1981), the state is responsible for private actions

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[6] The Commission's involvement in determining the content of messages carried over Mountain Bell's 976 Message Network is typical of the regulatory involvement in other states, which makes the issues presented here national in scope and especially deserving of consideration by this Court. *E.g., Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1359-60 (11th Cir. 1986) (Florida's utility commission); *In re Restriction Servs. for Calls to Information Serv. Providers*, No. U-1500-173 (Idaho Pub. Utils. Comm'n Oct. 8, 1987); *In re Mountain States Tel. & Tel. Co.'s Scoopline Serv.*, No. 87-37-TC (N.M. Corp. Comm'n Aug. 21, 1987); *In re Investigation of Certain Complaints Against Mountain Bell Tel. Co.*, No. 87-049-01 (Utah Pub. Serv. Comm'n Dec. 9, 1987).

"when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Given the substantial and continuous support, encouragement and approval of Mountain Bell's censorship by state agencies and officials, combined with the club of criminal prosecution or revocation of Mountain Bell's 976 Message Network franchise, Mountain Bell's "policy" is attributable to the state.

The taint of the state's involvement in Mountain Bell's censorship policy cannot be expunged "by attempting to separate the [independent] mental urges of the discriminators." *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (store manager's contention that he would have refused blacks service independent of the existence of a discriminatory ordinance did not save store's action from application of Fourteenth Amendment safeguards). Similarly, the transfer of trusteeship over a park from the City of Macon to "private" trustees did not dissipate "the momentum" of state involvement. *Evans v. Newton*, 382 U.S. 296, 301 (1966). (Whether effects of state involvement "will in time be dissipated is wholly conjectural"). Indeed, that Mountain Bell's purportedly independent "policy" was adopted while litigation was pending suggests that it was motivated to evade liability under section 1983 based upon a finding of state action. *Cf. NAACP v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982) (district court's failure to issue injunction was abuse of discretion when "reform" timed to blunt the force of a lawsuit).

This case thus presents substantial federal questions regarding the facts and circumstances to be weighed in determining the involvement of the state in private decisionmaking impinging upon constitutional rights. These are the types of recurring issues faced nationwide by state public utility commissions, regional telephone companies and information providers.

II. THE COURT OF APPEALS' DECISION PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO PROVIDE GUIDANCE IN THE "STATE ACTION" AREA.

A. *This Case Will Assist the Court in Resolving Questions Left Open in* Jackson.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) ("*Jackson*"), the Court held that the mere fact that a public utility is heavily regulated does not mean that its business activities — in that case collecting fees for electric services — are sufficiently attributable to the state to constitute state action. While acknowledging that the "acts of a heavily regulated utility . . . will more readily be found to be 'state' acts," the Court stated that something more was needed to establish a "nexus between the State and the challenged action of the regulated entity." *Id.* at 350-51.

What "more" is needed, beyond extensive state regulation, has been a matter of great uncertainty in cases decided since *Jackson*, particularly when the regulated utility engages in activities that impinge upon fundamental rights (*e.g.*, speech, association, voting, racial equality). This case presents an ideal opportunity to provide guidance in the "state action" area because it highlights public policy concerns not raised by the facts in *Jackson* — the utility's restrictions on the exercise of fundamental rights.[7] Unlike

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[7] *Jackson* did not consider whether a utility could avoid liability for the violation of fundamental rights unrelated to its ordinary business functions. In his dissent, Justice Marshall concluded that the Court would find state action where the regulated public utility terminated electric service on racial grounds. 419 U.S. at 373-74. That would have been the case if Metropolitan Edison had terminated service because of the content of Jackson's speech (as Mountain Bell indisputably did here), because the challenged conduct would have been unrelated to Metropolitan Edison's business of providing electric service. Similarly, the challenged acts

billing and collection for electric service (the business activities sought to be attributed to the state in *Jackson*), Mountain Bell's attempts to censor the public's communications implicates constitutionally protected freedoms, including the rights of adults seeking access to information as well as the rights of providers seeking to convey it. If, as the court of appeals held, Mountain Bell is free to discriminate against Carlin based upon message content, it is equally free to discriminate against message providers based upon race or political preference.

The facts presented in this case present an exceptional opportunity for the Court to bridge the analytical gap in "state action" between *Jackson* and cases in which the private actor sought to limit fundamental rights: *Marsh v. Alabama*, 326 U.S. 501 (1946) (private owner's regulation of leafletting on privately owned sidewalks), or *Evans v. Newton*, 382 U.S. 296 (1966) (access by blacks to privately owned park traditionally used for public gatherings), or *Terry v. Adams*, 345 U.S. 461 (1953) (access to election process run by private political party). In those cases, the private actor attempted to limit the means by which citizens communicate, vote or elect public officials — fundamental rights essential to the exercise of other constitutionally protected freedoms.[8] Like Mountain Bell in this case, the private actors in *Marsh, Evans* and *Terry* also were particularly subject to public pressure to ban unpopular minorities or expression. In such cases, the discriminatory actions fairly should be treated as those of the state.

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in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), probably would not have been attributed to the state had the customer been excluded for nonpayment rather than for racial reasons.

[8] *See also Gray v. Sanders*, 372 U.S. 368, 374-75 (1963) ("state regulation of this preliminary phase of the election process makes it state action"); *Chapman v. King*, 154 F.2d 460, 464 (5th Cir.) ("[t]he exclusions of voters made by the party by the primary rules become exclusions enforced by the State"), *cert. denied*, 372 U.S. 800 (1946).

B. *The Public Has an Interest in Ensuring that the Channels of Communication Remain Free, Whether They Are Publicly or Privately Owned.*

This Court has recognized that the exercise of certain powers or responsibilities necessarily implicates the state. *E.g., Jackson*, 419 U.S. at 352 (power of eminent domain); *Evans v. Newton*, 382 U.S. 296 (1966) (excluding persons from a park where people congregated); *Marsh v. Alabama*, 326 U.S. 501 (1946) (regulation of leafletting on privately owned sidewalks); *Terry v. Adams*, 345 U.S. 461 (1953) (regulation of election process). At the same time, the Court has found other activities to lack the requisite indicia of traditional governmental involvement. *E.g., San Francisco Arts & Athletics, Inc., v. United States Olympic Comm.*, 107 S. Ct. 2971, 2985 (1987) (coordination of amateur sports); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (operation of a school for maladjusted students); *Jackson*, 419 U.S. at 353 (utility's provision of electric service). Beyond these fact-specific examples, no set of criteria currently exists to determine what is or is not inherently governmental or how the traditional standard applies to communication channels such as the 976 Message Network.

The public function test must be applied carefully to the area of speech because, while the government usually owns the parks, streets and mails, it less frequently owns telegraph or telephone lines. The public function test, however, does not turn on whether the state traditionally engages in the line of business. Rather, it depends on whether the state traditionally *regulates* the challenged activity that the utility seeks to regulate. *Jackson*, 419 U.S. at 351.

In cases implicating speech rights, this Court has ruled that the state may not allow private persons to use property rights to deny free speech over channels of public communication. In *Marsh v. Alabama*, 326 U.S. 501, 505 (1946), the Court refused to allow the private owners of a

"company town" to exclude a Jehovah's Witness from distributing leaflets "simply because a single company has legal title to all the town." The Court held that state action was present: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507. The issue is not whether censoring speech is a traditional state function; it is whether the state may allow the private owner of a (regulated) public "channel[ ] of communication" to censor speech. *Cf.* L. Tribe, *American Constitutional Law* 1708-09 (2d ed. 1988) (discussing *Marsh*).

In this case, the court of appeals reasoned that censorship of messages to be transmitted in the future — a prior restraint of speech — is not the type of power traditionally reserved to the government, and thus should not constitute state action under a public function analysis.[9] By this reasoning, *no* action of a nongovernmental party could be held to have violated the civil rights laws on a public function analysis: If the action was unconstitutional, it would necessarily be "something that states may not do," and therefore not a public function. The Ninth Circuit's holding substantially undermines the reach of federal civil rights laws.[10]

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[9] "Censoring pornography . . . is something that states *may not do* . . . . Thus such censorship cannot possibly be said to be a 'power traditionally exclusively reserved' to the government." [App. A, p. A-12]

[10] Inconsistent rulings and analyses among courts based on facile characterization of the action are nowhere clearer than in the instant case. The Ninth Circuit defined the alleged public function as the exercise of censorship powers without a prior judicial determination — a function that the government is prohibited from doing by the First and Fourteenth Amendments. [App. A, p. 14] That power, unsurprisingly, was found not to be an exclusive and traditional governmental function. *Id.* In the same context, the Eleventh Circuit noted that "'public' censorship" powers may be traditional state prerogatives. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1361 (11th Cir. 1986). The Eleventh Circuit went on to characterize the function as "restriction of message

Indeed, contrary to the majority's tautology, the regulation of speech in forums of public communication traditionally has been a governmental prerogative. *See* F. Haiman, *Speech & Law in a Free Society* 297-98 (1981) (local governments traditionally "provid[e] and regulat[e] a public forum").[11] Historically, all message carriers have provided the *means* for transmission but have exercised no control over (and, correspondingly, no liability for) the *content* of messages transmitted over a "pipeline" dedicated to public use. "In the domain of the telegraph, telephone, computer,

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content by a private company based on a determination that it does not wish to do business with another company," and found no state action. *Id.* Yet another court in the same context identified the "public function" as "the protection of minors from exposure to obscenity," and thus found state action. *Carlin Communications, Inc. v. South Cent. Bell Tel. Co.*, 461 So. 2d 1208, 1212 (La. Ct. App. 1984). The test should be whether the *challenged activity* is a traditional state regulatory function, *Jackson*, 419 U.S. at 351, not whether the government engages in the line of business or whether the government would be barred on constitutional grounds from acting in the same fashion.

11 Moreover, governmental entities, not private parties, traditionally regulate communication in forums dedicated to public expression (although constitutionally only on a time, place, and manner basis). *E.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding as a valid time, place and manner restriction a National Park Service regulation preventing overnight demonstrations in Lafayette Park regarding the plight of the homeless); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812-15 (1984) (upholding against First Amendment challenge a Los Angeles Municipal Code provision prohibiting posting of signs on public property); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (upholding a state fairgrounds rule permitting sale, exhibition or distribution of materials only from fixed locations at state fair); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 72-73 (1976) (upholding a city zoning ordinance restricting the location of adult theaters); *Grayned v. City of Rockford*, 408 U.S. 104, 121 (1972) (upholding a city ordinance prohibiting willful making of noise on property adjacent to school during school hours); *Kovacs v. Cooper*, 336 U.S. 77, 78-79, 89 (1949) (upholding as a valid time, place and manner regulation a city ordinance prohibiting vehicles from emitting amplified sound on public streets); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986) (upholding District of Columbia statute prohibiting demonstrations within 500 feet of embassy), *cert. granted sub nom. Boos v. Barry*, 107 S. Ct. 1282 (1987).

and postal network, the prevailing legal policy has been one of fair and universal access to the facilities of the 'common carriers.'" L. Tribe, *American Constitutional Law* 1003-04 (2d ed. 1988).[12]

Before this case, the principle of content-neutrality had been understood to apply equally well to telecommunications carriers operating 976 Message Networks as forums for electronic communication. Indeed, in its comments before the FCC regarding federal regulation of sexually explicit messages over 976 Message Networks, Mountain Bell referred to "the content neutrality required by carriers." [SER 54, Ex. 16, p. 7; SER 54, Ex. 17] The FCC has recognized the "special duty of a common carrier to serve all parties indifferently" under the federal statute concerning the regulation of 976 Network services. [CR 54, Ex. 4, p. 34] *See also* ER 110, App. A, pp. 1-2 (1983 comments submitted by AT&T to the FCC on a new technology: "AT&T believes that carriers are legally required to be content-neutral with regard to customer transmissions, and that . . . a communications common carrier may not unilaterally terminate a customer's service due to the carrier's subjective evaluation of the content of the customer's message").

Even for the telephone-based systems for information distribution emerging in other countries, the telephone company may not control the content of messages: In France, the telephone company's Minitel videotex information service, analogous to Mountain Bell's 976 Message Network, "provides basically only a content-neutral transmission and switching conduit" and billing service. *United*

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[12] *Accord Lamont v. Postmaster General*, 381 U.S. 301 (1965) (unanimously holding statute permitting postmaster to detain "communist political propaganda" violative of First Amendment protections); *Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 14 (1894) (while telegraph companies were not "common carriers" — the case predates the Communications Act of 1934 — "they exercise a public employment, and are therefore bound to serve all customers").

States v. Western Elec. Co., 673 F. Supp. 525, 588–89 (D.D.C. 1987). Like the French service, the Japanese telephone company's electronic publishing forum functions essentially only as a "supplier of conduit, not of content." *Id.*

With respect to 976 Message Networks in this country, it fairly can be said that message content "traditionally" is regulated by the government. The FCC has statutory authority to issue time, place and manner restrictions on information communicated over 976 Message Networks. 47 U.S.C. § 223(b); *see Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984). Pursuant to tariffs and regulations, state utility commissions also "traditionally" regulate 976 Message Networks. The State of Arizona regulates Mountain Bell's 976 Message Network as a "public service" (the equivalent of a federal "common carrier"). Ariz. Const. art. 15, § 2 (1984) (defining "public service corporations" as "[a]ll corporations other than municipal engaged . . . in transmitting messages or furnishing public . . . telephone service [or] operating as common carriers") [App. C, p. A-19]; *id.* at § 10 (defining "common carriers" to include "[a]ll . . . transmission [or] telephone . . . corporations" that "transport[] . . . messages . . . for profit"). The district court found that Mountain Bell's 976 Message Network was a "public service" under Arizona law [App. B, p. A-17 (para. 2(c))], and the court of appeals "assume[d]" that this finding was correct [App. A, p. A-5 n.2].[13]

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[13] Indeed, Mountain Bell has *admitted* that it offers the 976 Message Network as a "public utility" [App. I, p. A-60 (para. 19)], and has admitted all of the facts necessary to reach this conclusion: (i) the "purpose" of the 976 Message Network is "transmitting . . . messages" [App. I, p. A-57 (para. 11)]; (ii) the 976 Message Network is a "telephone service" [*id.*]; and (iii) Mountain Bell offers the service for profit [ER 86, para. 4].

This case presents an ideal opportunity to clarify application of the public function test to regulation of message content by common carriers.

C. *This Case Presents State Action Issues Left Open in the "Shopping Center" Cases.*

This case also presents the issue left open in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972) — the exercise of First Amendment rights on private property dedicated by law as a forum for public communication. The issue in *Lloyd* was whether anti-war protestors had a First Amendment right to "distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling." *Id.* at 567 (emphasis by the Court). The Court concluded that the shopping center's ban on anti-war leafletting did not constitute state action because the "business of the shopping center" was not "expressive activity" and Lloyd made "[n]o . . . exceptions . . . with respect to handbilling." *Id.* at 564, 551. The Court distinguished *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and *Marsh v. Alabama*, 326 U.S. 501 (1946), as cases in which "the First Amendment activity was related to the [forums'] operations." *Id.* at 562.[14]

Here, as the operator of a "public service," Mountain Bell has received a monopoly from the state and the duty to operate its service for the benefit of public communication. Mountain Bell's business is precisely the business of providing a forum for "expressive activity." Indeed, both state and federal law *require* Mountain Bell to "use [its]

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[14] In *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), the Court explained "that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case," but in *Lloyd* the shopping center was not, under state law, a forum dedicated to the exercise of public communication. The facts of this case are more analogous to *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), where a state constitutional provision dedicated the shopping center's sidewalks as a forum for public communication.

property as a forum for the speech of others."[15] Mountain Bell's actions — far from being purely private — directly impact and affect the public "interest" in insuring, in the words of *Marsh*, that "the channels of communication remain free." 326 U.S. at 507.

III. THIS CASE HAS FAR-REACHING IMPLICATIONS FOR CHANNELS OF ELECTRONIC PUBLISHING — THE COMMUNICATIONS FORUM OF THE FUTURE.

A. *This Court Should Provide Guidance for the Emerging Electronic Publishing Industry.*

Among the "electronic publishing" systems recently available in the United States for transmitting electronic information are the 976 Message Networks of the regional telephone companies, also called "dial it" or "audiotext" systems.[16] The 976 Message Networks are communication forums that allow members of the public to access computer-stored-and-retrieved messages of electronic publishers such as Carlin.

The "electronic publishing industry is still in its infancy," *United States v. AT&T*, 552 F. Supp. 131, 182 (D.D.C. 1982) (Judge Greene's discussion in the AT&T divestiture case), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), but in the future "most published information will be distributed electronically."

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[15] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) (state may require shopping center owners to permit pamphletting without violating the constitutional rights of the property owners). Federal law precludes Mountain Bell from carrying its own messages over the 976 Message Network. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 567 (D.D.C. 1987) (maintaining restriction against the regional companies providing message content under antitrust decree).

[16] *See* Wiley, "Report on Legal Developments in Electronic Publishing," 27 JURIMETRICS 403, 404 (Summer 1987).

I. Pool, *Technologies of Freedom* 224 (1983); *accord United States v. Western Electric Co.*, 673 F. Supp. 525, 586 n.272 (D.D.C. 1987) ("Western Electric") ("It is not inconceivable that, because of the speed with which news and information can be transmitted electronically, [electronic publishing] could, in time, displace much conventional publishing").

"In electronic publishing, as in print publishing, only one [of the] various linked functions is generally monopolized, the physical transmission. Electronic publishers depend on the basic carrier just as print publishers depend on access to the postal system." *Technologies of Freedom* 218. For message providers wishing to communicate over the 976 Message Network, the "basic carrier" is one of the regional Bell operating companies, such as Mountain Bell. 976 Message Network information providers such as Carlin "must and do use the Regional Companies' local exchange facilities." *Western Electric,* 673 F. Supp. at 567.[17] In short, Carlin and other information providers "remain . . . dependent upon those facilities, and those who control them . . . ." *Id.* at 564.

There has been widespread public debate on how and whether these future channels of public communication will be protected by the First Amendment; indeed, in January 1988, the Congressional Office of Technology Assessment issued a study of this issue, entitled "Science, Technology and the First Amendment."[18] As Professor Pool observed in his seminal work *Technologies of Freedom:*

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[17] The court retained the restrictions preventing the regional telephone companies, including Mountain Bell, from providing the content of information services, because, for information providers such as Carlin, "there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks . . . ." *Western Electric*, 673 F. Supp. at 564.

[18] U.S. Cong. Off. Tech. Assessment, *Science, Technology & the First Amendment,* OTA-CIT-369 (U.S. Gov't Printing Off., 1988) ("Congressional Report").

> Networked computers will be the printing presses of the twenty-first century. If they are not free of public control, the continued application of constitutional immunities to non-electronic mechanical presses, lecture halls, and man-carried sheets of paper may become no more than a quaint archaism, a sort of Hyde Park Corner where a few eccentrics can gather while the major policy debates take place elsewhere.

Id. at 224-25.

As the Court noted in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952), "[e]ach method [of communication] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[19] "New technologies, such as electronic publishing, may not fit easily into old models of regulation", Congressional Report at 2, but the "peculiar problems" of this form of communication — that the public forum is privately "owned" — should not in itself limit the reach of the First Amendment.

The court of appeals' decision below simply failed to address the issue of how the problem peculiar to this new public forum for communication, analogous to parks and town halls, should be analyzed for purposes of protecting our citizens' traditional freedoms. To provide guidance to the federal and state courts, to state utility commissions, to the telephone carriers and to those in the emerging electronic publishing industry, this is an issue that should be considered by this Court.

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[19] *Accord Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (defining the term "press" in the First Amendment as one that "comprehends every sort of publication which affords a vehicle of information and opinion").

B. *The Ninth Circuit's Decision Will Stifle Other Emerging Channels of Public Communication.*

The majority's decision extends equally to other emerging technologies for information distribution. "Telecommunications policy is becoming communications policy as all communications come to use electronic forms of transmission." *Technologies of Freedom* 233. "Within the ambit of electronic publishing are . . . videotex, electronic mail, electronic bulletin boards, and electronic transactional services, such as home shopping and banking." Congressional Report at 20.[20] Like the 976 Message Network, these other means of distribution of electronic messages are privately owned but extensively regulated and subject to public pressure to censor unpopular messages.

For example, the Ninth Circuit's rule would apply to "videotex," an information-distribution technology that observers believe will be as important in this country as it has become abroad.[21] Videotex is an information-provision medium that allows home or business users to connect a computer terminal to an ordinary telephone line and obtain two-way access to a wide range of information services.[22]

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[20] "Electronic mail" is "an electronically transmitted message" service between computers and "is commonly available in most videotex services." Congressional Report at 20 n.6. Electronic mail can include "voice mail," a voice storage and retrieval system. *See* Wiley, "Report on Legal Developments in Electronic Publishing," 27 JURIMETRICS 403, 404 (Summer 1987). "An electronic bulletin board is a publicly accessible videotex computer file," often limited to a particular topic. Congressional Report, at 20 n.7.

[21] *See Western Electric*, 673 F. Supp. at 588–90 (describing French and Japanese videotex services and explaining the "importance of widely available information services" in this country).

[22] The French Government has experimented recently with a more extensive form of videotex, called "videophone," a combination telephone and television set that would allow selective access to visual information and entertainment (such as movie "rentals"). See The N.Y. Times, April 21, 1986, at D12, col. 1.

In other countries, most notably France, videotex is already accessible by millions of citizens. *Western Electric*, 673 F. Supp. at 588. On the French videotex system, Minitel, over 4,000 services are available.[23] The audiotext service at issue here is a slightly less sophisticated form of videotex: The 976 Message Network has only limited two-way capability and provides only aural information or entertainment. Nevertheless, just like videotex, the public accesses the network through ordinary telephone lines.

As noted above, the electronic publishing industry, including audiotext, videotex and myriad new technologies, will grow to become an important — if not *the* important — information conduit in the next century. The rules that courts establish for the 976 Message Network equally will apply to all variants of this important means of public communication.

The decision below thus raises the spectre of private, government-sanctioned censorship over the dominant channels of communication for the future. "No stronger instrument of censorship can be imagined than a monopoly on the means of delivery." *Technologies of Freedom* 80–81; *accord Western Electric*, 673 F. Supp. at 586 ("Control by one entity of both the content of information and the means for its transmission raises an obvious problem" and "pose[s] a substantial threat to the First Amendment diversity principle"). This significant issue of public communication policy rightly should be decided by the Supreme Court.

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[23] *Western Electric*, 673 F. Supp. at 588. For descriptions of some of the types of services, *see, e.g.*, Wash. Post, May 31, 1987, at W35; N.Y. Times, April 30, 1984, at D8, col. 1.

Conclusion

For the foregoing reasons, the Court should grant the petition and review the decision of the Court of Appeals for the Ninth Circuit.

March 4, 1988

Respectfully submitted,

David Allen Henderson
Counsel of Record

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLIN COMMUNICATIONS, INC., a New York corporation, SAPPHIRE COMMUNICATIONS, INC., an Arizona corporation, *Plaintiffs-Appellees,* v. THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, *Defendants-Appellants.*	No. 85-2797 D.C. No. CIV-85-1420-PHX-CLH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding

Argued and Submitted
May 14, 1987 — San Francisco, California

Filed September 14, 1987
Amended December 7, 1987

Before: Joseph T. Sneed, Arthur L. Alarcon and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Sneed; Dissent by Judge Canby

Counsel

David A. Henderson, Louis J. Hoffman, Phoenix, Arizona; Lawrence E. Adelman, Norman Beier, New York, New York, for the plaintiffs-appellees.

Ruth V. McGregor, Nancy L. Rowen, Phoenix, Arizona, for the defendants-appellants.

Order

The opinion in this case, filed September 14, 1987, is amended as follows: the following footnote is added at the end of the last full paragraph on page 13 of the slip opinion, to be numbered footnote 5, and footnote number 5 in the slip opinion is now number 6.

> [5]We do not address the situation in which a state imposes an unconstitutional condition upon the receipt of state benefits in order to coerce a public utility into pursuing a particular course of action. We therefore express no opinion on whether, in such a case, the motivation of the public utility would be relevant.

With the opinion so amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Opinion

SNEED, Circuit Judge:

Modern telephonic technology permits the pervasive transmission of vast quantities of information, as well as

Shakespeare, Shaw, and smut. The essential question before us is whether a regional telephone company, despite its public utility status, may refuse to carry smut on its dial-a-message network. The district court concluded that it may not. We disagree and therefore vacate the injunction granted below.

I.
FACTS

Carlin Communications supplies salacious telephone messages to the public. In early 1985, appellant Mountain States Tel. & Tel. Co. (Mountain Bell) began carrying Carlin's messages on its "976" or "Scoopline" dial-a-message network, which offers the public various kinds of information such as sports updates, weather reports, and the like. Business subscribers pay Mountain Bell for a 976 line to carry their messages, specifying the price per call they wish the public to be charged. Mountain Bell collects the dial-a-message charges as part of its regular billing process and, after subtracting its own share, remits the proceeds to its 976 business subscribers.

Community reaction to Carlin's messages was strongly adverse. School officials complained to Mountain Bell about children calling Carlin's number; newspaper editorials chastised Mountain Bell for profiting from such entertainment. On May 23, 1985, a deputy attorney of Maricopa County, Arizona, wrote to Mountain Bell threatening to prosecute if the company continued to provide 976 lines to Carlin. The letter stated that Carlin's 976 service violated an Arizona statute prohibiting the distribution of sexually explicit material to minors.[1]

Mountain Bell immediately sent Carlin a notice that its service would be terminated in five days. At the same

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[1] Ariz. Rev. Stat. § 13-3506(A) makes it "unlawful for any person knowingly to give, lend, show, advertise for sale or distribute explicit sexual material . . . to minors."

time, Mountain Bell filed a federal declaratory judgment action to determine its rights and duties. At an expedited hearing, the district court (per Copple, J.) held preliminarily that Carlin's message business did violate Arizona law and ordered Mountain Bell to proceed with its termination of Carlin's service on May 29, 1985, as scheduled. Mountain Bell did so.

Shortly thereafter, Mountain Bell's officers met and decided to adopt a policy of refusing 976 service to any company offering sexual "adult entertainment" messages, even if carrying the messages would not violate the laws of any of the various states within which Mountain Bell operates. On June 3, 1985, Mountain Bell publicly announced its new policy and voluntarily dismissed its declaratory judgment action.

Carlin brought suit against Mountain Bell both under 42 U.S.C. § 1983, asserting First Amendment rights, and under Arizona public utility law. Although Carlin originally sought damages as well as an injunction, it later waived its damage claims. The district court (per Hardy, J.) granted summary judgment to Carlin on both state and federal grounds. The court ordered Mountain Bell to restore Carlin's 976 service and permanently enjoined the phone company from disconnecting Carlin on the basis of message content. Mountain Bell appeals. To explicate our differences with the district court, we will discuss Carlin's rights first under state law and then under the Constitution of the United States.

II.
DISCUSSION

A. State Law

A public utility in Arizona, as elsewhere, must offer its service to "all persons alike without discrimination." *Trico Elec. Coop. Inc. v. Corp. Comm'n*, 86 Ariz. 27, 38, 339

P.2d 1046, 1054 (1959); *see* Ariz. Rev. Stat. § 40-334(A).[2] The district court held below that Mountain Bell's decision to exclude "adult entertainment" companies from its 976 network violated this duty. We disagree for two reasons.

1. ***Is the restriction on message content a form of "discrimination"?***

The principle of nondiscrimination does not preclude distinctions based on reasonable business classifications. *See* 1 A. Priest, *Principles of Public Utility Regulations* 286-87 (1969); 64 Am Jur. 2d *Public Utilities* § 38, at 578 (1972). A relevant example of such a distinction appears in *Dollar A Day Rent A Car Sys. v. Mountain States Tel. & Tel. Co.*, 22 Ariz. App. 270, 526 P.2d 1068 (1974). There the plaintiff challenged Mountain Bell's refusal to carry its advertisement in the yellow pages. As in our case, the refusal to carry plaintiff's message rested on an explicit content-based restriction: Mountain Bell's policy was to exclude all price advertising from the yellow pages, and the phone company had refused to print even the plaintiff's name in the directory because the name allegedly stated the price of plaintiff's product. Assuming without deciding that the nondiscrimination rule applied, the state court held that Mountain Bell's policy on price advertising and its refusal to carry Dollar A Day's advertisement did not constitute an impermissible discrimination.

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[2] Mountain Bell contends that it is not acting *qua* public utility when operating the 976 network. True, "the fact that a business or enterprise is, generally speaking, a public utility does not make every service performed by those owning or operating it a public service, with its consequent duties and burdens." *City of Phoenix v. Kasun*, 97 P.2d 210, 213 (Ariz. 1939). The parties therefore dispute whether the 976 network is a "public service" within the meaning of Arizona public utility law.

Yet we find it unnecessary to resolve this dispute. Instead we assume arguendo that the 976 network is a public service, because for the reasons stated we find no unlawful discrimination in any event.

Three factors were important to the court's decision in *Dollar A Day*. First, the challenged advertising policy was not directed arbitrarily at plaintiff but consistently applied to all. *See* 664 P.2d at 1072. Second, Mountain Bell had a legitimate interest in protecting itself from the liability that might arise from misquotations of price (whether deliberate or inadvertent). *Id.* Finally, Mountain Bell was furthering a state policy against deceptive advertising, even though its blanket rule went further than state prohibitions. *See id.* at 1073.

Similar considerations apply here. Carlin has not been singled out for adverse treatment; on the contrary, Mountain Bell expressly resolved to exclude *all* "adult entertainment" messages from the 976 network. Mountain Bell faces, moreover, potential criminal liability for carrying Carlin's messages under state obscenity laws. Finally, Ariz. Rev. Stat. § 13-3506 (prohibiting the distribution of sexually explicit material to minors) furnishes the same sort of public policy support for Mountain Bell's decision of which the court made use in *Dollar A Day*. Mountain Bell's policy here, as in *Dollar A Day*, is broader than the statute, which would not support a blanket prohibition of Carlin's service.[3] But the phone company's policy is clearly consonant with the public policy — protecting minors from "adult entertainment" — embodied in the statute.

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[3] Just how far indecency laws designed to protect minors may be extended to the dial-a-message industry is a matter of controversy. Narrow regulation may be permissible. *Cf. Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 848-55 (2d Cir. 1986) (discussing FCC's efforts to formulate constitutionally acceptable regulations — time of day restrictions, blocking device requirements, provision of access codes, etc. — that would control minors' access to pornographic dial-a-message services while permitting adequate adult access); *id.* at 856 (striking down latest regulations). As we hold below, however, prosecution of either Carlin or Mountain Bell under § 13-3506 in its current form would be unconstitutional.

Both the yellow pages and the 976 network provide a service to the public. Both carry messages from businesses to the public. *Dollar A Day*, even when viewed narrowly, indicates that Mountain Bell may exercise some business judgment about what messages, even lawful ones, it will carry. This strongly suggests that Mountain Bell permissibly exercised its judgment here.

2. *Phone Company as Broadcaster*

Moreover, we question whether state public utility law in its traditional form makes sense as applied to Mountain Bell's 976 network. The technology of that network differs fundamentally from that of basic phone service. As pointed out above, individuals do not speak *to* each other on the 976 lines. Instead, "over 7,900 callers can be connected simultaneously to the same recorded message." *Carlin Communication, Inc. v. FCC*, 787 F.2d 846, 850 (2d Cir. 1986). Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station.

Once the telephone company becomes a medium for public rather than private communication, the fit of traditional common carrier law becomes much less snug. *See generally CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 104-09 (1973) (discussing reasons why Congress decided to exempt radio stations from common carrier status). Arizona may, of course, decide to make the phone company operate the 976 network as a content-neutral public forum open to any and all speakers. We are very reluctant, however, to *infer* such a principle from traditional public utility law.

We therefore decline to hold that state public utility law compels Mountain Bell to carry salacious or pornographic messages, both lawful and unlawful, on its 976 network.

B. Federal Law

Carlin also sued Mountain Bell under 42 U.S.C. § 1983, alleging a violation of its First Amendment rights. To succeed under § 1983, Carlin must initially show that Mountain Bell's conduct was "state action." It is settled law that Mountain Bell's actions cannot be deemed state action simply because of the phone company's public utility status. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-54 (1974); *Martin v. Pacific Northwest Bell Tel. Co.*, 441 F.2d 1116, 1118 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971). The district court found state action nevertheless in both Mountain Bell's initial termination of Carlin's service *and* its subsequent policy decision to exclude all "adult entertainment" messages from the 976 network. We agree that state action inhered in the first decision but hold that it did not in the second. This conclusion requires us to vacate the injunction granted below.

1. *The Initial Termination*

a. *Was there state action?*

As stated earlier, Mountain Bell was informed by a deputy county attorney that Arizona criminal law prohibited its carrying Carlin's messages on the 976 network. The deputy attorney advised Mountain Bell to terminate Carlin's service and threatened to prosecute Mountain Bell if it did not comply. With this threat, Arizona "exercised coercive power" over Mountain Bell and thereby converted its otherwise private conduct into state action for purposes of § 1983. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). This is not a case like *Occhino v. Northwestern Bell Tel. Co.*, 675 F.2d 220, 225 (8th Cir.), *cert. denied*, 457 U.S. 1139 (1982), in which the phone company without any particularized state participation terminated a customer's service for making abusive calls. The facts here are closer to *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 598-99 (3d Cir. 1979), *cert. denied*, 446 U.S. 956 (1980), where state officers actively participated in a racetrack's decision to expel a

driver for violating state racing regulations. The county attorney's threat of prosecution provided the requisite "nexus" between the state and the challenged action. *See Jackson,* 419 U.S. at 351.

Mountain Bell insists that it remains an unresolved question of fact whether the county attorney's letter was the real motivating force behind the termination. Even if unresolved, this factual question is immaterial.

In *Peterson v. City of Greenville,* 373 U.S. 244 (1963), a city ordinance required restaurants to segregate their customers by race. As to the particular restaurateur involved, there was evidence that he knew of the ordinance but not that he segregated his customers *because* of the ordinance. The Court found that the segregation was state action *"even assuming,* as respondent contends, *that the manager would have acted as he did independently of the existence of the ordinance." Id.* at 248 (emphasis added). Simply by "command[ing] a particular result," the state had so involved itself that it could not claim the conduct had actually occurred as a result of private choice. *Id.* The same conclusion applies here. *Cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 68 (1963) (state could not argue that bookseller was free to ignore letter threatening prosecution if he continued to carry "objectionable" books).

b. *Was the state action unconstitutional?*

Mountain Bell asserts, in any event, that the initial termination of Carlin's service was not unconstitutional because Carlin was, as Judge Copple originally found, disseminating obscene messages to the public. We disagree on two grounds.

First, the termination of Carlin's service was an unlawful prior restraint. Even when a speaker has repeatedly exceeded the limits of the First Amendment, courts are extremely reluctant to permit the state to close down

his communication forum altogether. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (state could not close movie theatre despite repeated showings of obscene movies); *Near v. Minnesota*, 283 U.S. 697 (1931) (state could not shut down newspaper for repeatedly printing defamatory statements); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980) (state could not close bookstore for selling obscene materials), *aff'd mem,*. 454 U.S. 1022 (1981). Moreover, the county attorney's office issued its threat to Mountain Bell before there had been a judicial determination that any of Carlin's messages were obscene. That is precisely the kind of state action that the Court struck down as a prior restraint in *Bantam Books*. *See* 372 U.S. at 69-71; *see also Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1359-62 (5th Cir.) (in absence of previous judicial determination, threats to arrest retailers who carried certain magazines constituted unlawful prior restraint), *cert. dismissed*, 447 U.S. 931 (1980).

Second, Arizona's criminal statute protecting minors, the state law under which the county attorney's office threatened to prosecute Mountain Bell, cannot be constitutionally applied against Carlin's message service. The First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to "hearing only what is fit for child." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Narrow regulations on indecent material have been upheld in the context of ordinary broadcasting in order to protect children. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). However, Arizona's statute is not narrow, *see Cruz v. Ferre*, 755 F.2d 1415, 1421-22 (11th Cir. 1985) (ban of all indecent material on cable television was overbroad), and the 976 service differs from ordinary broadcasting in that listeners must take deliberate steps to hear the particular kinds of messages they choose. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (distinguishing *Pacifica* where minors' access to messages was "less intrusive and uncontrollable");

Cruz, 755 F.2d at 1420-21 (same). We agree with the Second Circuit and with the United States Congress that a criminal law prohibiting indecent communications to minors cannot be applied against parties like Carlin or Mountain Bell unless it is narrowly drawn to suit the dial-a-message industry. *See Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 847 (2d Cir. 1986); *supra* note 3; *cf.* 47 U.S.C. § 223(b)(2) (directing the FCC to issue regulations governing dial-a-message services and making compliance with such regulations a defense to federal prosecution for indecent communication to minors).

Arizona has two options in responding to Carlin's messages. It may prosecute vigorously under its obscenity laws, or it may establish a prior-review permit system with procedures that satisfy the requirements laid down in *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). It may not, however, simply close down Carlin's communication forum by threatening Mountain Bell with prosecution, and it may not proceed against either Mountain Bell or Carlin under its indecency laws.

c. *To what remedy is Carlin entitled?*

Thus the initial termination of Carlin's service was unconstitutional state action. It does not follow, however, that Mountain Bell may never thereafter decide independently to exclude Carlin's messages from its 976 network. It only follows that the *state* may never *induce* Mountain Bell to do so.[4] The question is whether state action also inhered in Mountain Bell's decision to adopt a policy excluding all "adult entertainment" from the 976 network. We hold that it did not.

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[4] Except that it waived such claims here, Carlin might have been entitled to some form of retrospective relief as well.

2. *Mountain Bell's new policy was not state action.*

The district court held that Mountain Bell was performing a "public function" when it acted to "protect[ ] the public from sexually suggestive messages." E.R. Supp. tab 180 at 107. On this theory Judge Hardy deemed Mountain Bell's new policy to be state action. *Id.* The Eleventh Circuit, however, recently decided that a very similar policy as adopted by another regional phone company did not constitute state action under the "public function" theory. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1361 (11th Cir. 1986). We agree.

The "public function" test for state action is satisfied only when the private actor is exercising "powers traditionally exclusively reserved" to the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (public electricity utility was not engaged in a "public function"). It is clear from *Jackson* that Mountain Bell is not a state actor in the ordinary performance of its public utility business. To hold that Mountain Bell assumed a "public function" when it exercised censorship powers is illogical. No such function could be performed by the State. Censoring pornography without a prior judicial determination of its obscenity is something that states *may not do;* it is a thing that *private parties alone* — newspapers, television networks, publishers, and so on — may do. Thus such censorship cannot possibly be said to be a "power traditionally exclusively reserved" to the government.

Mountain Bell insists that its new policy reflected its independent business judgment. Carlin argues that Mountain Bell was continuing to yield to state threats of prosecution. However, the factual question of Mountain Bell's true motivations is immaterial.[5]

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[5] We do not address the situation in which a state imposes an

This is true because, inasmuch as the state under the facts before us may not coerce or otherwise induce Mountain Bell to deprive Carlin of its communication channel, Mountain Bell is now free to once again extend its 976 service to Carlin. Our decision substantially immunizes Mountain Bell from state pressure to do otherwise.[6] Should Mountain Bell not wish to extend its 976 service to Carlin, it is also free to do that. Our decision modifies its public utility status to permit this action. Mountain Bell and Carlin may contract, or not contract, as they wish.

We reverse and remand to have vacated the district court's permanent injunction.

REVERSED AND REMANDED.

CANBY. Circuit Judge, dissenting:

Judge Sneed has written a characteristically well-focused and unencumbered opinion, and I agree with much of it. I join in his reasoning and conclusions that Mountain Bell's initial suspension of Carlin's services was infected with state action and that suppression of Carlin's messages by the state violated the first amendment. Where I part

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unconstitutional condition upon the receipt of state benefits in order to coerce a public utility into pursuing a particular course of action. We therefore express no opinion on whether, in such a case, the motivation of the public utility would be relevant.

[6] Depending on whether Carlin's messages are legally obscene, Mountain Bell could still face criminal liability for carrying Carlin's messages. To that extent it could be said that the phone company remains subject to state pressure not to carry Carlin's messages. That Mountain Bell might yield, however, to the pressure of an otherwise valid and applicable obscenity law does not convert that law into an unlawful prior restraint. *See United States v. Young*, 465 F.2d 1096, 1100 (9th Cir. 1972) (application of obscenity law to mailing service was no more of a prior restraint than its application to creators of the material who initiated the mailing process). Some self-censorship is an inevitable result of all obscenity laws.

company with the majority is in its conclusion that Mountain Bell's "new" policy, adopted some ten days after the deputy county attorney threatened to prosecute Mountain Bell, was not imbued with state action. My reasons are three.

First, there is no evidence that the state has retreated from the threats that initially caused Mountain Bell to suspend Carlin's services unconstitutionally. So long as official compulsion or the threat of it remains, the subjective motives of Mountain Bell do not save its actions from the Constitution's reach. *Peterson v. City of Greenville,* 373 U.S. 244 (1963).[1]

Second, it is no answer to say that the state's compulsion has ceased to exist because our decision today immunizes Mountain Bell from the unconstitutional state pressure. By that reasoning, no plaintiff could ever obtain injunctive relief against a private party on a state action theory. The very success of the lawsuit would remove the state compulsion, leaving only private action not subject to injunction. While injunctions against private parties imbued with state action are not without their problems, *see Jackson v. Statler Foundation,* 496 F.2d 623, 637-38 (2d Cir. 1974) (en banc) (Friendly, J., dissenting from denial of rehearing en banc), we should refrain from adopting a rationale that forecloses them entirely. *See Lee v. Macon County Bd. of Educ.,* 267 F. Supp. 458, 478 (M.D. Ala.), *aff'd mem. sub nom. Wallace v. United States,* 389 U.S. 215 (1967) (continued state aid to segregated private school will render such school a state actor and subject it to state-wide segregation order). Particularly is this so when the entanglement between the private party and the state is substantial.

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[1] Should the state threats recede entirely at some time in the future, and should Mountain Bell otherwise be able to show its suspension of Carlin's service to be independent of the state, the injunction can be lifted. The district court retained jurisdiction to modify the injunction if necessary or appropriate.

See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Third, the connection of Mountain Bell with the state is stronger than it would otherwise be because of Mountain Bell's status as a regulated utility. It is true that *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), held that the actions of a private, regulated utility do not automatically become those of the state. But the test in such cases is whether the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1981). Here state legislators "encouraged," and a deputy county attorney coerced, Mountain Bell into suspending Carlin's services.[2] If that suspension can only be permitted under state utility law by the state's fashioning a service exception for sexually explicit but non-obscene messages, *cf. Dollar A Day Rent a Car Sys. v. Mountain States Tel. & Tel. Co.*, 22 Ariz. App. 270, 526 F.2d P.2d 1068 (1974), then the state has further insinuated itself into the first amendment censorship violation. Thus, while state regulation alone would not lead to a conclusion that Mountain Bell acted as the state, that regulation under the circumstances of this case constitutes one more factor linking the state with Mountain Bell's acts of censorship. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961).

For these reasons, I would affirm the district court's injunction.

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[2] The presence of this coercion differentiates this case from *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357 (11th Cir. 1986).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARLIN COMMUNICATIONS, INC., a New York corporation; SAPPHIRE COMMUNICATIONS, INC., an Arizona corporation, Plaintiffs,	
v.	No. CIV 85-1420 PHX CLH
THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation; ROBERT K. CORBIN, ATTORNEY GENERAL FOR THE STATE OF ARIZONA; BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, Defendants.	ORDER OF FINAL JUDGMENT

This action came on for pretrial conference on September 13, 1985, plaintiffs' motion for an accelerated trial and final pretrial conference having been granted, the Honorable Charles L. Hardy, District Judge, presiding. At that time, plaintiffs offered to allow dismissal without prejudice of claims arising out of termination of their message services in the State of Colorado and waived damages with respect to all remaining claims. In the interest of simplifying the issues and avoiding unnecessary proof, the parties raising no remaining issues that need to be tried, it is

ORDERED, ADJUDGED AND DECREED:

DISMISSAL OF CLAIMS

1. Dismissing without prejudice plaintiffs' claims arising out of termination of their message services in Colorado, and dismissing with prejudice plaintiffs' claims for damages arising out of termination of their information services in Arizona.

DECLARATORY JUDGMENT

2. Granting final declaratory judgment on plaintiffs' claims, declaring that:

a. Mountain States Tel. & Tel. Co. ("Mountain Bell's") termination of plaintiffs' 976 Network message services in Arizona pursuant to Tariff 2.2.9(A)(7) is an unconstitutional prior restraint of speech:

b. Dissemination of sexually explicit prerecorded messages over telephones is not prohibited by A.R.S. § 13-3506 because such messages are not tangible "material" or "items" as used therein; and

c. Because Mountain Bell is a public service corporation and its 976 Network Service is a public service, Mountain Bell may not, under Arizona law, limit access to its 976 Network based on the content of the messages.

PERMANENT INJUNCTION

3. Granting plaintiffs' claim for injunctive relief against Mountain Bell: Mountain Bell, its agents, servants, employees, attorneys, and those persons in active concert and participation with it are hereby permanently enjoined and restrained from failing to reconnect plaintiffs' 976 Network message services for the Northern Arizona LATA or

from disconnecting plaintiffs' 976 Network message services in the Northern Arizona LATA under any rule or policy based on the content of the messages. The reasons for the permanent injunction are that plaintiffs have prevailed on the merits of their claims that Mountain Bell's termination of service was illegal, that as a result plaintiffs have suffered and, without injunctive relief, would suffer irreparable loss of First Amendment rights, and that an injunction is necessary to restore the status quo as it existed prior to Mountain Bell's illegal termination of plaintiffs' message services.

DISMISSAL OF STATE OFFICIALS

4. Dismissing without prejudice plaintiffs' claims against Bruce Babbitt, Governor of the State of Arizona, and Robert K. Corbin, Attorney General of the State of Arizona.

CONTINUING JURISDICTION

5. Jurisdiction is retained over this action for the purpose of taxing costs, considering any application for attorneys' fees that might be made, and modifying the terms of the injunction if necessary or appropriate.

DATED this 10th day of October, 1985.

/s/ CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

Appendix C

Applicable Constitutional, Statutory and Regulatory Provisions
Ariz. Const. art. 15 § 2

§ 2. "Public service corporations" defined

Section 2. All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Ariz. Const. art. 15 § 3

§ 3. Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulations

Section 3. The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission.

Ariz. Rev. Stat. § 13-3501

Definitions

In this chapter, unless the context otherwise requires:

1. "Item" includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription or other similar items.

2. An item is obscene within the meaning of this chapter when:

(a) The average person, applying contemporary state standards would find that the item, taken as a whole, appeals to the prurient interest; and

(b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and

(c) The item taken as a whole, lacks serious literary, artistic, political or scientific value.

3. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when to the average adult applying contemporary state standards with respect to what is suitable for minors, it appeals to the prurient interest of minors in sex, which portrays sexual conduct in a patently offensive way, and which does not have serious literary, artistic, political, or scientific value.

4. "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of:

(a) The character and content of any material described in this chapter, which is reasonably susceptible of examination by the defendant, and, if relevant to a prosecution for violation of § 13-3506,

(b) The age of the minor, provided that an honest mistake shall constitute an excuse from liability under this article if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

5. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

6. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

8. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

10. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

Ariz. Rev. Stat. 13-3506.

Furnishing obscene or harmful items to minors; classification

A. It is unlawful for any person knowingly to give, lend, show, advertise for sale or distribute explicit sexual material, as defined in § 13-3507, to minors or to give, lend, show, advertise for sale or distribute to minors any item which is harmful to minors.

B. It is unlawful for any person knowingly to openly display explicit sexual material, as defined in § 13-3507, or material harmful to minors in any place where minors are invited as part of the general public.

C. A violation of any provison of subsection A or B of this section is a class 5 felony.

2.2.9 TERMINATION OF SERVICE — COMPANY INITIATED

A. REASONS FOR TERMINATION

The Company may terminate service, with notice, due to:

1. Nonpayment

Any sum due the Company beyond the payment date.

2. Abandonment

In the event of the abandonment of the service.

3. Obscenities

Use of foul or profane language over the lines of the Company.

4. Abuse

a. Use of service that interferes with another customer's service or that is used for any purpose other than communication.

b. Directory Assistance to obtain a subscriber's listed name, address or telephone number for any purpose other than to facilitate the making of a telephone call shall constitute an abuse of the service.

5. Fraud

The impersonation of another with fraudulent intent. Abuse or fraudulent use of service includes the use of service or facilities of the Company to transmit a message or to locate a person otherwise to give or obtain information, without payment of a message toll charge.

6. Party Line Abuse

Listening in on party line conversations, the use of service by a customer in connection with a plan or contrivance to secure a large volume of telephone calls to be directed to such customer at or about the same time resulting in preventing, obstructing or delaying the telephone service of others.

7. Unlawful Use of Service

The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Company receives other evidence that such service is being or will be so used.

8. Violation of Tariff

Any other violation of the regulations of the Company, the Company may, without notice, either suspend service or terminate the service without suspension.

Appendix D

Excerpts from Mountain Bell's 976 Network Service Sponsor Overview

I. Service Description

976 Network Service allows private firms to provide information to callers for a fee. Programs may consist of prerecorded announcements or interactive computer data bases. Program sponsors not only have sole responsibility for program content, but they also determine the price that the caller will be charged for calling their program. A portion of the total charge per call represents Mountain Bell's rate for transporting, billing and collecting each call, as specified in the tariff, and is retained by Mountain Bell; the remainder represents the sponsor's fee to the caller for the information provided, and those fees are passed on to the sponsor. A caller who calls from outside the local calling area will pay the appropriate toll charges in addition to the 976 charge.

Calls to 976 numbers are routed over specialized interoffice trunks that are designed to handle large volumes of calls. Currently, the service is only available using the 976 prefix and unique access lines; it cannot be obtained with ordinary business lines. All callers, whether local or long distance, have to dial a "1" before dialing the 976 number.

II. Availability

Initially, 976 Network Service will only be offered in Denver, Phoenix, and Salt Lake City. Service is provided out of a single central office in each city: Denver Main, Phoenix Main, and Salt Lake City West. Sponsors are required to subscribe to enough lines to handle their anticipated call volumes; in any event, the minimum number of lines required is 2. Maps

showing the street boundaries of the serving central offices are enclosed as Attachments I, II, and III. The Salt Lake City map also identifies several locations that appear to have spare facilities at this time.

III. Reservation of Telephone Numbers

Any company who expresses or has expressed a desire for a specific 976 telephone number will be placed on a waiting list for that number based on the date their request was received in writing by Mountain Bell. Once tariffs are effective in a particular state, companies on such waiting lists will be given a 30-day opportunity to reserve those numbers for their use subject to Specific Number, Universal Number and/or Reserved Number charges as appropriate. If the first company on a list chooses not to reserve the number, then it would be offered to the next company on the list. If a company selecting a number puts a program on line immediately, then that number would be assigned to that order and placed into service. However, if the number is to be held for that company's future use, Reserved Number charges must be paid as specified in the tariff. Reservation of a number in this fashion does not guarantee the availability of central office capacity or local cable facilities. It does not affect a company's position with regard to the prioritization process outlined below. A copy of the current waiting list is included as Attachment IV.

The following numbers are not available for assignment: 976-0000 through 976-0999, inclusive. Additionally, 976-1616 in Phoenix only will be held out of service until approximately July, 1985, when new white pages telephone directories are issued. At that time, it would be offered using the same waiting list procedure outlined on the previous page.

A copy of the Reserved Number Request is enclosed as Attachment VII. It should be completed for each city involved, as well as for each number. Reserved Number Request forms should be mailed to the following address:

Laurie Deffenbaugh
Product Manager
Mountain Bell
1125 17th St., Rm. 430
P.O. Box 1300
Denver, CO 80201

IV. Allocation of Resources

Because a large number of companies have indicated a desire to subscribe to 976 Network Service, it is necessary to prioritize the order in which such requests will be evaluated. The prioritization procedure that will be used is as follows:

1. No applications will be accepted prior to tariff approval.

2. Once tariffs are approved, we will finalize the date, time and location for submitting applications. At this time, the anticipated start date for accepting applications is January 7, 1985. Applications for all three locations will be processed in Denver, Colorado, at the following address:

   Mountain Bell
   Denver Service Center Auditorium
   1005 17th St.
   Denver, CO 80202

3. Applications may be submitted in person, or may be delivered by a messenger, delivery service or

other representative. They may also be submitted by regular mail, although selection of this method may delay the receipt of those applications. If regular mail is selected, do not mail them to the Auditorium address. Instead, mail them to the address provided above for Reserved Number Requests.

4. Each person may only submit applications for 1 company.

5. Initially, each company may only submit 1 application per city.

6. Applications will be prioritized based on the order in which they are received. At this time, we plan to have an independent accounting firm witness the process and report the results.

7. At this time, we plan to require that each application include the following:

   — A completed 976 Network Service Request Form for each location.

   — A notarized document stating that all terms and conditions of the application/prioritization process have been complied with.

   — A certified check or money order in the amount of the System Establishment Charge, $1800.00, for each location. If an application is approved and a service order placed, this money will be applied as an advance payment on the bill. If, on the other hand, the applicant is placed on a waiting list, the advance payment thus obtained will be returned in full.

8. Any position on the list for 976 Network Service is non-assignable. If the person or company named on the original application does not establish service

when offered the opportunity, they will be dropped from the list.

9. It is anticipated that the initial application process would be completed within 1–2 weeks. Once it is completed, companies are free to submit as many additional applications per location as they desire. These subsequent applications do not need to be accompanied by either the notarized statement or the advance payment. They will be placed on the waiting list following the applications received initially. Due to the upcoming holidays, we plan to delay the start date for receipt of these additional applications until January 21, 1985. Please submit them to the address provided for Reserved Number Request forms.

10. The 976 Service Request Form is found in Attachment VIII. In addition, an example of the contract that a sponsor would sign upon application approval is provided as Attachment IX.

It must be understood that this prioritization process does not ultimately determine the specific date on which a particular company's program is placed into service. Once applications have been prioritized, they will be evaluated according to the following:

1. Is there sufficient capacity in the network to accommodate the expected call volume?

2. Are there sufficient facilities available at the requested address to provide the necessary lines?

If both network capacity and local facilities are available, a due date will be established. If network capacity is not available, applications will be placed on a waiting list in priority order. If network capacity is available but local facilities are not, then negotiations regarding cable jobs or other special construction will be handled

on a case by case basis. There are circumstances wherein a sponsor would be required to pay the costs of cable installation; these are determined on an individual basis. Additionally, a lower priority sponsor whose application has been approved and whose facilities are available could have service installed while a higher priority sponsor was waiting for completion of cable installation.

V. Rates and Charges

Enclosed is a copy of the tariff filed in Colorado for 976 Network Service. It is anticipated that other states' tariffs would be similar to this one. All tariffs are subject to State Commission approval and therefore are not firm until that approval is received. The rates for 976 Network Service are expected to be similar in each state, except for charges for the lines themselves. A summary of those preliminary rates is found in Attachment V.

In addition to the rates and charges outlined, installation charges as identified in section A3 would apply to any access lines installed, and service order charges would apply to any service order placed in Arizona and Colorado. For assistance in calculating the correct charges that would apply, please feel free to contact the personnel identified on Attachment VI.

ATTACHMENT IV

Reserved Number Waiting List
(976-XXXX)

1000
Communications Team
RKB Corporation
TEL-Line Systems–

1111
Dial Info
Sidney King
National Tele-Information Network

1212
Communications Team
Sidney King
Fone-It
William Murphy

1234
Fone-It
William Murphy

1311
Fone-It

1313
Communications Team
Sidney King
Fone-It
National Tele-Information Network
William Murphy
Pacific Broadcast Interconnect Consultants

1332
National Tele-Information Network

1411
TEL-Line Systems

1414
Fone-It

1515
Fone-It

1611
Sidney King

1616
Communications Team
Sidney King
Fone-It

1717
Fone-It

1818
Fone-It

1910
Burton Wherry

1919
Fone-It

1976
TEL-Line Systems

2000
Sidney King

2020
Communications Team
Fone-It

2121
Communications Team
Fone-It

2222
Dial Info
Fone-It

2255
William Murphy
TEL-Line Systems

2265
National Tele-Information Network

2274
Carlin Communications
Benamy International
Dial-976 America

2323
Communications Team

2489
Dial-976 America

2525
Communications Team

2583
Benamy International

2626
Carlin Communications

2653
William Murphy

2727
Carlin Communications
Sidney King

2828
Carlin Communications

2829
Phone Programs

2866
RKB Corporation

3131
Fone-It

3213
National Tele-Information Network

3228
Dial-976 America

3232
Fone-It

3279
National Telephone
Planning Corporation

3283
National Tele-Information
Network

3325
Deak Perera

3333
Dial Info
Phone Programs

3434
Pacific Broadcast
Interconnect Consultants

3438
National Tele-Information
Network

3456
Dial-976 America

3463
Bruce Radon

3636
Communications Team
Fone-It

3663
Dial Info

3733
Bruce Radon

3767
JAYKAM Production

3838
Communications Team

3866
Van Carver

4111
TELASSIST

4141
Communications Team
Sidney King
Fone-It

4263
Dial-976 America
Communications Team

4321
Sidney King

4327
William Murphy

4444
Carlin Communications
Dial Info
Communications Team
Fone-It

4545
Pacific Broadcast
Interconnect Consultants

4636
National Tele-Information Network
Dial Info
Shipley Enterprises

4653
Dial Info

4673
Carlin Communications

4676
Dial Info

5000
TEL-Line Systems

5050
Productions By Phone
Fone-It

5151
Productions By Phone
Fone-It

5252
Productions By Phone
Fone-It

5353
Productions By Phone
Fone-It

5436
Van Carver

5437
National Tele-Information Network
Phone Programs
RKB Corporation
Dial-976 America

5454
Productions By Phone
Fone-It

5463
InfoLine Inc.
RKB Corporation

5555
Dial Info

5627
National Tele-Information Network
Dial-976 America

5653
Dial Info
Dial-976 America

5656
Productions By Phone
Fone-It

5673
National Tele-Information Network
Tel Enterprises

5757
Productions By Phone
Fone-It

5825
Dial-976 America

5858
Productions By Phone
Fone-It

5959
Productions By Phone
Fone-It

6060
Productions By Phone
Fone-It

6161
Productions By Phone
Fone-It

6262
Productions By Phone
Fone-It

6283
National Tele-Information
Network

6337
Dial Info

6368
National Tele-Information
Network

6397
Communications Team
Dial Info
Phone Programs
Dial-976 America

6587
Dial Info

6666
Dial Info

6843
Communications Team

6900
Van Carver

6969
Carlin Communications
Van Carver

6973
Carlin Communications

7000
RKB Corporation

7171
Sidney King
Fone-It

7223
National Tele-Information
Network
Dial-976 America

7246
Dial-976 America

7267
National Tele-Information Network
RKB Corporation

7283
Communications Team
RKB Corporation

7373
Carlin Communications

7399
National Tele-Information Network

7446
Dial-976 America

7467
National Tele-Information Network

7469
Dial Info

7529
National Tele-Information Network

7625
Communications Team

7627
Communications Team
Dial-976 America

7655
Bruce Radon

7676
Communications Team

7711
Phone Programs

7729
Dial Info

7767
RKB Corporation

7777
Dial Info
RKB Corporation
Fone-It

7827
RKB Corporation

7865
RKB Corporation

8181
Fone-It

8255
National Tele-Information Network

8463
Carlin Communications
William Murphy
Dial-976 America

8477
National Tele-Information Network

8484
Pacific Broadcast Interconnect Consultants

8766
Traveltron

8785
Traveltron

8888
Dial Info
Dr. Rudy Ingersoll

9090
National Tele-Information Network

9122
Sidney King

9191
Fone-It
National Tele-Information Network

9467
National Tele-Information Network

9627
National Tele-Information Network

9696
National Tele-Information Network

9797
National Tele-Information Network

9999
Dial Info
Dr. Rudy Ingersoll
Fone-It

ATTACHMENT V

PROPOSED RATES

System and Access Line Rates	One-Time	Monthly
976 Network Service		
— System Establishment	1800.00	—
— Sponsor Remittance	—	40.00
Access Lines	(Note 1)	(Note 2)
Features		
— Reserved Number	50.00	100.00
— Specific Number	50.00	—
— Universal Number	50.00	—
Change in Sponsor Selected Price	350.00	—

Note 1 — Same Central Office installation charges as those that apply to measured business lines would apply. In addition, Service Order, Premises Visit, System Jack, and other charges may apply. For accurate quotes, contact the Mountain Bell personnel identified elsewhere in this document.

Note 2 — Same monthly charges as those that apply to one-way, in-only measured business trunks. Rate per line:

Arizona	17.40
Colorado	17.61
Utah	26.54

Per Call Rates

— First Minute or Fraction Thereof	.15
— Each Additional Minute or Fraction Thereof	.05
— Each Call Reaching a Busy Condition in Excess of 35 per Day	.02

ALL RATES ARE SUBJECT TO COMMISSION APPROVAL AND MAY ONLY BE USED FOR ILLUSTRATIVE PURPOSES UNTIL SUCH APPROVAL IS RECEIVED.

ATTACHMENT VI

For assistance in calculating rates and charges, checking on facility availability, determining deposit requirements, and so forth, please contact the following:

Phoenix
Ms. Amy Schmelzel
3101 N. Central
Room 600
Phoenix, Arizona 85012
(602) 235-5140

Denver
Mr. Rollie Whetstine
999 18th St.
Room 620C
Denver, Colorado 80202
(303) 896-1805

Salt Lake City
Mr. Chris Roberts
250 Bell Plaza
Room 1306
Salt Lake City, Utah 84111
(801) 237-4411

Appendix E

BEFORE THE ARIZONA CORPORATION COMMISSION

MARCIA WEEKS Chairman RENZ JENNINGS Commissioner DALE MORGAN Commissioner	
IN THE MATTER OF THE COMMISSION'S MOTION TO RESCIND, ALTER OR AMEND DECISION NOS. 54266, 55148, 55307 and 55712 REGARDING THE PROVISION OF "976" AND "676" SCOOPLINE SERVICE BY MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.	DOCKET NO. E-1051-84-288 DOCKET NO. E-1051-86-186 DOCKET NO. E-1051-86-282 DOCKET NO. E-1051-87-217 ORDER TO SHOW CAUSE DECISION NO. 55828

OPEN MEETING
December 23, 1988
Phoenix, Arizona

BY THE COMMISSION:

FINDINGS OF FACT

1. Mountain States and Telegraph Company ("Mountain Bell") is a Colorado corporation authorized to

conduct business in Arizona and presently providing telephone and other telecommunications services as a common carrier within portions of Arizona pursuant to authority granted by this Commission.

2. In Decision No. 54266, issued December 10, 1984, the Commission approved a tariff filed by Mountain Bell which introduced "976" Network Service to the Phoenix Metropolitan Area. This service provides mass transport of calls to information providers, called sponsors. Customers calling a "976" number are charged at rates specified by the sponsor and billed by Mountain Bell who retains a portion of the amount collected. The Commission concluded, among other things, in Decision No. 54266 that approval of the tariff was in the public interest.

3. In Decision No. 55148, issued August 20, 1986, the Commission approved a similar tariff filed by Mountain Bell which introduced "676" Scoopline service to the Tucson Metropolitan Area. The Commission concluded, among other things, in Decision No. 55148 that approval of the tariff was in the public interest.

4. In Decision Nos. 55307 and 55712, Mountain Bell filed tariff revisions to its "976" and "676" Scoopline service which permitted subscribers to prevent completion of "976" and "676" calls upon payment of an installation charge and a recurring monthly charge.

5. Since the Commission first approved the provision of Scoopline service by Mountain Bell in Decision No. 54266, the Commission has received numerous complaints regarding the service. Among the complaints received are those which allege:

a. The service should be discontinued or modified because it provides minors with unrestricted access to sexually explicit and obscene conversations intended for adults;

b. The service should be discontinued or modified because of the enormous charges that a minor with unrestricted access to such services can incur. The Commission has received complaints from parents of minor children who have incurred charges totalling thousands of dollars in a single month;

c. Some providers of "976" and "676" services either fail to disclose the applicable charges or provide misleading descriptions of the applicable charges;

d. Restrictive Scoopline access service should be provided without fee or charge by Mountain Bell;

e. Restrictive Scoopline access should be made available to business customers; and

f. Mountain Bell's billing practices with regard to "976" and "676" services in the event a customer is either unable or refuses to pay for "976" or "676" services are arbitrary and unfair when billed by Mountain Bell.

6. The volume and nature of the complaints received by the Commission gives the Commission reason to believe that continued provision of "976" and "676" Scoopline service in its current form is no longer in the public interest and that the service should either be discontinued or that the terms and conditions upon which it is offered should be altered or amended.

CONCLUSIONS OF LAW

1. Mountain States Telephone and Telegraph Company is a public service corporation within the meaning of Article XV of the Arizona Constitution.

2. The Commission has jurisdiction over Mountain States and of the subject matter of this Order to Show Cause

pursuant to Article XV of the Arizona Constitution, A.R.S. § 40-203 and A.R.S. § 40-252.

3. Pursuant to A.R.S. § 40-252 the Commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it.

ORDER

IT IS THEREFORE ORDERED that Mountain Bell appear on January 26, 1988 at 9:30 a.m. at the offices of the Commission, 1200 West Washington, Phoenix, Arizona to show cause why the Commission should not rescind, alter or amend Decision Nos. 54266, 55148, 55307 and 55712 and either discontinue 976 and 676 Scoopline service or alter or amend the terms and conditions upon which the service is offered.

IT IS FURTHER ORDERED that Mountain Bell file testimony on or before January 15, 1988 to describe the actions it intends to take, if any, to address the problems recited in this Decision with the provision of "976" and "676" Scoopline service.

IT IS FURTHER ORDERED that Mountain Bell immediately provide notice of this proceeding and the hearing scheduled herein to "976" and "676" Scoopline sponsors.

IT IS FURTHER ORDERED that this Decision should become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed at the Capitol in the City of Phoenix, this 23 day of December, 1987.

JAMES MATTHEWS
Executive Secretary

DISSENT _____

Appendix F

Excerpts from Arizona Corporation Commission Minutes of Special Working Session December 22, 1987

14. Mountain States Tel. & Tel. Co. (E-1051-87-299) -- tariff filing to revise scoopline restriction service --

Utilities Division staff explained the rationale in recommending an order requiring Company to appear before the Commission to show cause why the scoopline service should not be eliminated or substantially curtailed. Based on the volume of complaints received by the division, alleged misleading content of advertising, a preponderance of sexually oriented material -- all often resulting in exhorbitant telephone charges -- plus other problems, staff concludes that affirmative Commission action is indicated. The very recently filed Bell tariff to eliminate installation charge on blocking services on 976 and 676 prefixes for a 60-day period, then automatically reinstate that charge, was discussed. The Commission consensus favored a 90-day free blocking period and counsel for Bell indicated the Company would be agreeable. Ted Humes, director of the Residential Utility Consumer Office, offered comments.

Appendix G

(Letterhead of)

Office of the Maricopa County Attorney
101 W. Jefferson Street, Suite 400
Phoenix, Arizona 85003
(602) 262-3411

May 21, 1985

Mr. Don Cline
Vice President
Mt. Bell
3033 North 3rd Street
Phoenix, Arizona 85012

RE: Obscene telephone messages

Dear Mr. Cline:

Please be advised that this office is investigating obscene telephone messages which are delivered to a person when that person dials 1-976-4846, 1-976-6000 or 1-976-6900. There may be other numbers, but those are the only ones that we are aware of at this time.

We believe that those messages violate A.R.S. §13-3506, and since your company provides the means for the distribution of those messages to minors, we believe you may be equally culpable with the subscribers who pay you for those services.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

/s/ Randy H. Wakefield

RANDY H. WAKEFIELD
Deputy County Attorney

RWH/skd

(Letterhead of)

Office of the Maricopa County Attorney
101 W. Jefferson Street, Suite 400
Phoenix, Arizona 85003
(602) 262-3411

May 23, 1985

Mr. Don Cline
Vice-President
Mountain Bell
3033 North 3rd Street
Phoenix, Arizona 85012

RE: Obscene Telephone Messages

Dear Mr. Cline:

This letter is in regard to the following telephone numbers: 976-4848; 976-6000 (disconnected); 976-4660; 976-2727; 976-6969; 976-6900 and 976-7529 (not working).

With the exception of 976-6000 and 976-7529, I have reviewed the sexually explicit messages that anyone can hear by dialing any of those numbers and I believe that the messages one hears by dialing those numbers violates A.R.S. §13-3506. Based upon the volume of complaints we have received from parents, we believe that there is ample evidence that the calls are being distributed to minors. In light of that fact, these services should be terminated.

Should Mountain Bell continue to air these messages, it is the intention of this office to prosecute not only the subscribers who provide the messages, but Mountain Bell.

If you have any questions, please feel free to contact me.

Sincerely,

/s/ Randy H. Wakefield

RANDY H. WAKEFIELD
Deputy County Attorney

RHW/skd

Appendix H

(Letterhead of)

Mountain Bell
Law Department
Suite 1013
3033 North Third Street
Phoenix, Arizona 85012
Phone (602) 236-1577

C. Webb Crockett
Arizona General Attorney

May 23, 1985

Carlin Communications, Inc.
801 Second Avenue
New York, New York 10017
Attention: Brendan Corrigan

Re: Termination of service for
Telephone number (1) 976-2727

Gentlemen:

Please be advised that the Maricopa County Attorney's Office, has advised The Mountain States Telephone and Telegraph Company (the "Company") that the telephone service furnished to you at the above cited number is being used in violation of Section 13-3506 Arizona Revised Statutes in that that service distributes "explicit sexual material" to minors.

We call your attention to Part 2.2.9 A.7 of the Exchange and Network Services Tariff of this Company, on file with the Arizona Corporation Commission. That tariff provides in pertinent part that:

> "The Company may terminate service, with notice, due to:
>
> . . .

"7. Unlawful Use of Service

"The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Company receives other evidence that such service is being or will be so used."

The foregoing tariff is consistent with Section R 14-02-509 of the Rules and Regulations of the Arizona Corporation Commission. Accordingly and pursuant to the above cited tariff provisions, Save Enterprises is hereby advised that service to telephone number (1) 976-2727 will be suspended and terminated on or after 5:00 p.m. Mountain Standard Time, May 29, 1985.

You may contact me at the above address and telephone number for further information with respect to this termination.

Very truly yours,

/s/ C. Webb Crockett

C. Webb Crockett
Arizona General Attorney

TRF/11

Original forwarded by Airborne

Duplicate original by regular mail

(Letterhead of)

Mountain Bell
Law Department
Suite 1013
3033 North Third Street
Phoenix, Arizona 85012
Phone (602) 236-1577

C. Webb Crockett
Arizona General Attorney

May 23, 1985

Sapphire Communications of Arizona, Inc.
801 Second Avenue
New York, New York 10017
Attention: Brendan Corrigan

Re: Termination of service for
Telephone number (1) 976-6969

Gentlemen:

Please be advised that the Maricopa County Attorney's Office, has advised The Mountain States Telephone and Telegraph Company (the "Company") that the telephone service furnished to you at the above cited number is being used in violation of Section 13-3506 Arizona Revised Statutes in that that service distributes "explicit sexual material" to minors.

We call your attention to Part 2.2.9 A.7 of the Exchange and Network Services Tariff of this Company, on file with the Arizona Corporation Commission. That tariff provides in pertinent part that:

> "The Company may terminate service, with notice, due to:
>
> . . .

"7. Unlawful Use of Service

"The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Company receives other evidence that such service is being or will be so used."

The foregoing tariff is consistent with Section R 14-02-509 of the Rules and Regulations of the Arizona Corporation Commission. Accordingly and pursuant to the above cited tariff provisions, Save Enterprises is hereby advised that service to telephone number (1) 976-6969 will be suspended and terminated on or after 5:00 p.m. Mountain Standard Time, May 29, 1985.

You may contact me at the above address and telephone number for further information with respect to this termination.

Very truly yours,

/s/ C. Webb Crockett

C. Webb Crockett
Arizona General Attorney

TRF/11

Original forwarded by Airborne

Duplicate original by regular mail

Appendix I

John D. Everroad
Phillip F. Fargotstein
1500 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

Lynwood J. Evans
The Mountain States Telephone
and Telegraph Company
3033 North Third Street, Room 1012
Phoenix, Arizona 85012

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado Corporation; Plaintiff, vs. SAVE ENTERPRISES, a Tennessee Corporation; TELEPHONE COMMUNICATIONS, a California Corporation; CARLIN COMMUNICATIONS, INC., a New York Corporation; SAPPHIRE COMMUNICATIONS OF ARIZONA, INC., a New York Corporation; HISPANIC SPORTS NETWORK, a California Corporation; TOM COLLINS, MARICOPA COUNTY ATTORNEY; ARIZONA CORPORATION COMMISSION; and the STATE OF ARIZONA, Defendants.	NO. COMPLAINT (Declaratory Judgment)

Plaintiff alleges:

1.

This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

2.

This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1332, and 1343.

3.

This is a proceeding for a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 to determine and define the legal rights, duties and obligations of plaintiff, The Mountain States Telephone and Telegraph Company ("Mountain Bell") and the defendants as they relate to the transmission of adult oriented messages originated by certain defendants over telecommunications equipment owned and operated by plaintiff.

4.

The Mountain States Telephone and Telegraph Company ("Mountain Bell") is a corporation organized under the laws of the State of Colorado and is authorized to conduct business and does conduct business in the State of Arizona as a public utility and common carrier and provides telecommunications services to customers in Arizona.

5.

On information and belief, Save Enterprises is a corporation organized under the laws of the State of Tennessee and does business in the State of Tennessee and the State

of Arizona. Save Enterprises caused an event to occur in the State of Arizona and County of Maricopa out of which this case and controversy arose.

6.

On information and belief, Telephone Communications is a corporation organized under the laws of the State of California and does business in the State of California and State of Arizona. Telephone Communications caused an event to occur in the State of Arizona and County of Maricopa out of which this case and controversy arose.

7.

On information and belief, Carlin Communications, Inc. is a corporation organized under the laws of the State of New York and doing business in the State of New York and the State of Arizona. Carlin Communications, Inc. caused an event to occur in the State of Arizona and County of Maricopa out of which this case or controversy arose.

8.

On information and belief, Sapphire Communications of Arizona, Inc. is a corporation organized under the laws of the State of New York and doing business in the State of New York and the State of Arizona. Sapphire Communications of Arizona, Inc. caused an event to occur in the State of Arizona and County of Maricopa out of which this case or controversy arose.

9.

On information and belief, Hispanic Sports Network is a corporation organized under the laws of the State of California and doing business in the State of California and Arizona. Hispanic Sports Network caused an event to occur in the State of Arizona and County of Maricopa out of which this case and controversy arose.

10.

On information and belief, none of the foregoing named corporate defendants have qualified to do business in the State of Arizona.

11.

On or about December 16, 1984, Mountain Bell initiated telephone service whereby customers could reserve telephone numbers with the prefix 976 for the purpose of transmitting commercial messages. The service was entitled "Scoopline Service" and was available only in the northern LATA (Local Access Transport Area) which included the Phoenix metropolitan area and essentially the northern half of the State of Arizona. Said service was provided under the authority of the Competitive Network Services Tariffs § 100, a copy of which is attached as "Exhibit A."

12.

Subsequent to initiation of the "Scoopline Services," defendants Save Enterprises, Telephone Communications, Carlin Communications, Inc. Sapphire Communications of Arizona, Inc. and Hispanic Sports Network contracted with Mountain Bell for the use of said service.

13.

Between on or about May 21 and May 23, 1985, Mountain Bell received letters from a Deputy Maricopa County Attorney, Randy Wakefield, advising Mountain Bell that in the opinion of the County Attorney, the messages transmitted over certain designated telephone numbers used by the foregoing named corporate defendants violated Arizona Revised Statutes § 13-3506 which states:

> A. It is unlawful for any person knowingly to give, send, show, advertise for sale or distribute explicit sexual material, as defined in

> [A.R.S.] § 13-3507, to minors or to give, lend, show, advertise for sale or distribute to minors any item which is harmful to minors.
>
> B. It is unlawful for any person knowingly to openly display explicit sexual material, as defined in [A.R.S.] § 13-3507, or material harmful to minors in any place where minors are invited as part of the general public.

Copies of the letters of May 21 and 23 are attached as "Exhibits B and C."

14.

The County Attorney indicated that since Mountain Bell provided the means for the distribution of the messages to minors, it was equally culpable with the subscribers who contracted for the services and further that if Mountain Bell continued to air said messages, it was the intention of the County Attorney to prosecute both Mountain Bell and the subscribers who provided the messages.

15.

As a public utility, Mountain Bell is required by A.R.S. § 40-201 et seq. to follow the rules and regulations promulgated by the Arizona Corporation Commission and the tariffs filed by Mountain Bell with said Commission. Part 2.2.9 A.7 of the Exchange and Network Services Tariff provides in pertinent part as follows:

> The Company may terminate service, with notice, due to:
>
> . . .
>
> 7. Unlawful Use of Service

> The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Company receives other evidence that such service is being or will be so used.

16.

Under Article 15, §§ 2 and 3, Arizona Constitution, the Arizona Corporation Commission is empowered and directed to regulate public utilities.

17.

On or about May 23, 1985, as a result of the letters from the County Attorney's office, and under threat of criminal prosecution for not exercising pre-censorship on the content of messages not adjudicated obscene, Mountain Bell forwarded letters to Save Enterprises, Telephone Communications, Carlin Communications, Inc. Sapphire Communications of Arizona, Inc. and Hispanic Sports Network advising them of the opinions of the Maricopa County Attorney and notifying them that pursuant to Part 2.2.9 A.7 of the Exchange and Network Exchange Services Tariff cited above, Mountain Bell would suspend and terminate the subject services on or after 5:00 p.m. on May 29, 1985. Said notices were provided in accordance with Arizona Corporation Commission Rules and Regulations, R. 14-02-509 promulgated by the Arizona Corporation Commission that requires five day advance, written notification prior to such suspension and termination. Copies of the letters mailed to the defendants are attached as "Exhibits D, E, F, G and H."

18.

On information and belief, the suspensions and termination of the Scoopline services to the subject customers will result in legal action by said customers for damages and/or injunctive relief based upon breach of contract and damages under the provisions of 42 U.S.C. § 1983 in addition to claims under the First and Fourteenth Amendments to the United States Constitution.

19.

As a public utility, Mountain Bell is also required by A.R.S. § 40-334 to refrain from preferential treatment of any person with respect to rates, charges, service, facilities or in any other respect.

20.

The Attorney General as chief legal officer of the State of Arizona may have some interest in this Court's construing of Arizona statutes, rules or regulations.

SAPPHIRE COMMUNICATIONS, 801 Second Avenue, New York, N.Y. 10017; 112 North Central Avenue, Suite 317, Phoenix, Arizona; and its attorneys Lawrence Abelman, ABELMAN, FRAYNE, REZAC & SCHWAB, 703 3rd Avenue, New York, N.Y. 10017

NATIONAL TELEINFORMATION NETWORK, INC., 9363 Wilshire Boulevard, Penthouse Suite, Beverly Hills, CA 90210, and 112 North Central Avenue, Suite A1A, Phoenix, Arizona

4. That the complaint was hand-delivered to the State of Arizona, Maricopa County Attorney, Arizona Corporation Commission, and was mailed, Federal Express, to each of the corporate entities out of state;

5. In addition, affiants have hand-delivered or mailed, Federal Express, a copy of a motion, pursuant to Rule 57, to accelerate the hearing of this matter to Wednesday, May 29, 1985 at 10:00 a.m. and has provided to them a form of Order setting forth same.

FURTHER AFFIANTS SAYETH NOT.

_____

Lynwood J. Evans

_____

John D. Everroad

SUBSCRIBED AND SWORN TO before me this 24th day of May, 1985.

_____

Notary Public

My Commission Expires:
November 27, 1988

WHEREFORE, Mountain Bell requests this Court to determine:

1. Whether the messages in questions are "sexually explicit" as defined under Arizona law, pornographic, or otherwise in violation of state or federal law,

2. Mountain Bell's rights, responsibilities, duties and obligations as a public utility and common carrier under the Tariffs on file with the Arizona Corporation Commission, the applicable Rules and Regulations of the Arizona Corporation Commission, and Arizona statutes, federal statutes and applicable Constitutional provisions with regard to the pre-censorship of communications transmitted over Mountain Bell facilities.

DATED this 24th day of May, 1985.

FENNEMORE, CRAIG, von AMMON, UDALL & POWERS

By _____

John D. Everroad
Phillip F. Fargotstein
1500 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

By _____

Lynwood J. Evans
3033 North Third Street
Phoenix, Arizona 85012

Attorneys for Plaintiff

Appendix J

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AND TELEGRAPH COMPANY
3033 North Third Street, Rm 1012
Phoenix, Arizona 85012

Attorneys for Defendant Mountain Bell

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CARLIN COMMUNICATIONS, etc. et al., Plaintiffs,	)	
v.	)	No. CIV 85-1420 PHX CLH
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, etc. et al., Defendants.	)	AFFIDAVIT OF JAMES F. MAHER

STATE OF COLORADO)
) ss.
County of Denver)

JAMES F. MAHER, being first duly, sworn upon his oath, deposes and says:

1. I am employed by The Mountain States Telephone and Telegraph Company ("Mountain Bell") in Denver, Colorado, as Executive Vice President and Chief Operating Officer. In this capacity, I am responsible for determining the policy and directing the operations of the Company's Network, Marketing and Regulatory departments and state organizations.

2. After Scoopline service in Arizona was instituted and Mountain Bell had sent the first bills to its customers containing Scoopline charges, Mountain Bell began receiving numerous heated complaints from parents who objected both to abnormally large telephone bills allegedly run-up by their children in calling one or more of the five Scoopline adult entertainment numbers, and to the sexual content of the messages received upon calling those numbers. News articles and editorials appeared expressing the public concern over Mountain Bell's role in billing for and "profiting" from such services.

3. In addition, some legislators and school officials expressed their concerns over Mountain Bell's association with these services and Mountain Bell received a letter dated May 21, 1985, from the Maricopa County Attorney's office, signed by Deputy County Attorney Randy H. Wakefield, alleging that the messages disseminated over the five Scoopline lines violated the Arizona Revised Statutes.

4. Mountain Bell filed suit on May 24, 1985, and obtained a court order from the Honorable William P. Copple, United States District Court Judge, ordering it to terminate Scoopline service to the five entities.

5. The President, Vice President of Public Relations, Public Affairs and Assistant to the President, the Vice President and General Counsel, and I met on May 31, 1985, to re-examine the question of whether Mountain Bell, as a private business entity, should continue to associate with sexually-related "adult entertainment." In light of the public reaction against Mountain Bell's role in billing for and "profiting" from these services as illustrated by expressions of concern by legislators, school officials, the numerous customer complaints concerning the content of the messages, and the continued negative media coverage, we unanimously decided that Mountain Bell's corporate image and reputation were suffering intolerable damage and that Mountain Bell should be disassociated from sexually-related adult entertainment. To implement this policy decision, it was decided that Mountain Bell would not be in the business of providing Scoopline services in any state in which it operates, which includes Arizona, Colorado, where the Company had not received complaints, Idaho, Montana, New Mexico, Utah and Wyoming to any subscriber which proposed to use a line for adult entertainment with sexual content or containing foul or profane language irregardless of whether the message was sufficiently explicit to violate Arizona's or any other state's obscenity statutes.

FURTHER AFFIANT SAYETH NOT,

JAMES F. MAHER

SWORN AND SUBSCRIBED to before me on [this] 17th day of July, 1985.

Notary Public
931 14th Street, Room 1400
Denver, CO 80202

My Commission Expires:
03-04-87

Certificate of Service

The undersigned counsel of record for Petitioners certifies that he is a member of the Bar of this Court and that to his knowledge, on March 4, 1988, within the permitted time, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served upon counsel for Respondent by mail, first-class postage prepaid, in Phoenix, Arizona, addressed as follows:

Lynwood J. Evans, Esq.
The Mountain States Telephone and
Telegraph Company
3003 North 3rd Street, No. 1012
Phoenix, Arizona 85007

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/s/ David A. Henderson
Counsel of Record